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In the Supreme Court of the United States

BRADLEY J. STINN, PETITIONER,

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Amendment guarantees the right to a unanimous jury verdict in federal criminal cases. The lone holdout juror who adheres to her conscience that the government has not proved its case beyond a reasonable doubt embodies the final bulwark of individual liberty for a criminal defendant. This case presents two questions on which the courts of appeals are deeply divided regarding a trial judge's improper coercion or removal of a lone holdout juror:

1. Whether a trial judge's issuance of an *Allen* charge violates a federal defendant's constitutional rights when the jury is deadlocked eleven to one in favor of conviction, and when the identity of the lone holdout juror has been divulged.

2. Whether a trial judge's removal of a lone holdout juror in favor of innocence should be subject to heightened review to ensure that the juror's removal was not related to her view of the strength of the government's case.

TABLE OF CONTENTS

Question Presented i
Opinion Below 1
Jurisdiction 1
Constitutional Provisions Involved 2
Statement 2
Reasons for Granting The Petition 10

I. The Court Should Resolve the Circuit Split Regarding The Constitutionality Of Giving An *Allen* Charge After A Holdout Juror Is Identified 16

A. The Judgment Below Directly Conflicts With Ninth Circuit Cases Holding That An *Allen* Charge Following Disclosure Of A Holdout Juror's Identity Is *Per Se* Coercive 16

B. The Conflict Between The Second And Ninth Circuits Reflects A Broader Division Among Federal And State Courts As To The Propriety Of Delivering An *Allen* Charge Following Identification Of A Holdout Juror 20

C. The District Court's Ultimate Removal Of Juror 10 Did Not Moot The Court's Error In Giving The Coercive *Allen* Charge 24

II. The Court Should Grant Certiorari To Resolve The Circuit Split Regarding The Standard For Reviewing The Removal Of A Known Dissenting Juror 26

A. The Circuits Are Divided On The Standard For Reviewing A Juror's Removal Where The Juror's View Of The Merits Possibly Influenced Her Removal.....26

B. The Second Circuit's Abuse-Of-Discretion Review Was Inadequate Given The Strong Possibility That Juror 10's Removal Was Based On Her View Of The Merits.....29

Conclusion.....34

Appendix

Appendix A: May 26, 2010 Opinion, United States Court of Appeals for the Second Circuit.....1a

Appendix B: May 4, 2009 Final Judgment of Conviction, United States District Court for the Eastern District of New York.....7a

Appendix C: March 20, 2008 Trial Proceeding, United States District Court for the Eastern District of New York.....11a

Appendix D: March 24, 2008 Trial Proceeding, United States District Court for the Eastern District of New York.....34a

Appendix E: March 13 - 20, 2008 Trial Court Exhibits, United States District Court for the Eastern District of New York.....38a

Appendix F: January 19, 2009 Opposition to Motion for Release Pending Appeal in the United States District Court for the Eastern District of New York.....45a

Appendix G: *Allen* Charge in *United States* v. *Williams*, 547 F.3d 1187, 1203 (9th Cir. 2008) and *Allen* Charge in *United States v. Stinn*.....47a

Appendix H: Fifth and Sixth Amendments of the U.S. Constitution 50a

TABLE OF AUTHORITIES

CASES — PAGE(S)

Andres v. *United States*, 333 U.S. 740 (1948) 2

Apodaca v. *Oregon*, 406 U.S. 404 (1972) 11

Arizona v. *Washington*, 434 U.S. 497 (1978) 25

Benlamine v. *United States*, 692 A.2d 1359 (1997) 22

Blakely v. *Washington*, 542 U.S. 296 (2004) 32

Brasfield v. *United States*, 272 U.S. 448 (1926) 14

Brooks v. *Bay State Abrasive Products, Inc.*, 516 F.2d 1003 (5th Cir. 1987) 21

Commonwealth v. *Greer*, 951 A.2d 346 (Penn. 2008) 24

Graham v. *State*, 601 A.2d 131 (Md. 1992) 24

Harris v. *United States*, 622 A.2d 697 (D.C. Ct. App. 1993) 23

Johnson v. *Louisiana*, 406 U.S. 356 (1972) 11

Lowenfield v. *Phelps*, 484 U.S. 231 (1988) .. 2, 13, 14, 25

Lyell v. *Renico*, 470 F.3d 1177 (6th Cir. 2006) 21

McDonald v. *Chicago*, 130 S. Ct. 3020 (2010) 2, 11

In re Murchison, 349 U.S. 133 (1955) 14

Renico v. *Lett*, 130 S. Ct. 1855 (2010) 26

Sanders v. *Lamarque*, 357 F.3d 943 (9th Cir. 2004) 26

Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 14

Skilling v. *United States*, 130 S. Ct. 2896 (2010) 15

Smith v. *United States*, 542 A.2d 823 (1988) 22, 23

State v. *Kaiser*, 504 N.W.2d 96 (S.D. 1993) 23, 24

State v. *Luanglath*, 863 A.2d 631 (R.I. 2005) 23

State v. *McCutcheon*, 723 P.2d 666 (Ariz. 1986)..... 23

Thaggard v. *United States*, 354 F.2d 735 (5th Cir. 1965) 18

Thomas v. *State*, 748 So. 2d 970 (Fla. 1999) 23

United States v. *Abbell*, 271 F.3d 1286 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002)..... 10, 27, 28

United States v. *Allen*, 164 U.S. 492 (1896)..... 18

United States v. *Brown*, 823 F.2d 591 (D.C. Cir. 1987) 10, 27, 32

United States v. *Chigbo*, 38 F.3d 543 (11th Cir. 1994) 20, 21

United States v. *Correa-Ventura*, 6 F.3d 1070 (5th Cir. 1993) 13

United States v. *Duncan*, 598 F.2d 839 (4th Cir. 1979), cert. denied, 444 U.S. 871 (1979) 31

United States v. *Edwards*, 303 F.3d 606 (5th Cir. 2002), cert. denied, 537 U.S. 1192 (2003) 28

United States v. *Fioravanti*, 412 F.2d 407 (3d Cir. 1969) 18

United States v. *Flannery*, 451 F.2d 880 (1st Cir. 1971) 18

United States v. *Ginyard*, 444 F.3d 648 (D.C. Cir. 2006) 29

United States v. *Knight*, 58 F.3d 393 (8th Cir. 1995), cert. denied, 516 U.S. 1099 (1996) 21

United States v. *McElhiney*, 275 F.3d 928 (10th Cir. 2001) 15, 18

United States v. *Robinson*, 560 F.2d 507 (2d Cir. 1977) 18, 19, 20, 22

United States v. *Ruggiero*, 928 F.2d 1289 (2d Cir. 1991) 19

United States v. *Sae-Chua*, 725 F.2d 530 (9th Cir. 1984) 10, 16, 22

United States v. *Steele*, 785 F.2d 743 (9th Cir. 1986) 31

United States v. *Symington*, 195 F.3d 1080 (9th Cir. 1999) 10, 26, 27

United States v. *Turner*, 936 F.2d 221 (6th Cir. 1991) 31

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 25

United States v. *Warner*, 498 F.3d 666 (7th Cir. 2007), cert. denied, 128 S. Ct. 2500 (2008) 28

United States v. *Williams*, 547 F.3d 1187 (9th Cir. 2008) 10, 16, 17

Victor v. *Nebraska*, 511 U.S. 1 (1994) 12

STATUTES AND CONSTITUTIONAL PROVISIONS

Fifth Amendment, U.S. Constitution 2, 14

Sixth Amendment, U.S. Constitution ..... *passim*

15 U.S.C. 78j(b) 3

18 U.S.C. 1348 3

18 U.S.C. 1349 3

28 U.S.C. 1254(1) 2

OTHER AUTHORITIES

Jeffrey Abramson, *We The Jury: The Jury System and the Ideal of Democracy* (1994) 12

Hugh Brackenridge, *Law Miscellanies* (1814) 12

S. Ct. Brief for the United States in Opposition, *Abbell* v. *United States*, 2002 WL 32135404 (August 21, 2002) (No. 01-1618) 11

S. Ct. Brief for the United States in Opposition, *Warner* v. *United States*, 2008 WL 1957744 (April 25, 2008) (No. 07-977) 11

Herrera v. *Oregon*, *petition for cert. filed* (U.S. Sept. 9, 2010) 11

Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 Cardozo L. Rev. 1417 (1997) 13

James Wilson, *Works of the Honourable James Wilson* (Philadelphia, Lorenzo Press 1804) 12

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PETITION FOR A WRIT OF CERTIORARI

Bradley Stinn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a-6a) is not published in the Federal Reporter, but is available at 2010 WL 2094259.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2010. On July 28, 2010, Justice Ginsburg extended the time within which to file a petition for certiorari to September 23, 2010. On September 8, 2010,

Justice Ginsburg further extended the deadline to October 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, set out in full in the appendix to the petition (App. 50a), provides in pertinent part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution, set out in full in the appendix to the petition (App. 50a), provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury."

STATEMENT

The Sixth Amendment guarantees the right to a unanimous jury verdict in federal criminal cases. *Andres* v. *United States*, 333 U.S. 740, 748-749 (1948); see also *McDonald* v. *Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010). Thus even a single juror's reasonable doubt is constitutionally sufficient to preclude a defendant's conviction. Any action by the trial court to coerce the verdict of the jury, or even the vote of an individual juror, violates the defendant's fundamental jury trial right. See *Lowenfield* v. *Phelps*, 484 U.S. 231, 239, 241 (1988).

In this case, the trial judge's conduct seriously compromised Stinn's right to an uncoerced, unanimous jury verdict. After learning that a single, identified juror was the lone holdout in favor of innocence, the court delivered a supplemental verdict-urging instruction

that, in context, the holdout juror could only have perceived as directed at her. Immediately thereafter, in the midst of clear evidence that the lone holdout juror faced considerable pressure from an increasingly hostile majority, the district court, *sua sponte*, raised the possibility of *removing* the holdout juror for "health" reasons. Before the planned "health" interview could take place, the jury majority made a charge of juror misconduct against the holdout juror. An interview with the juror revealed both that the majority's charge was greatly exaggerated and that the majority's hostility to the holdout because of her expressed "doubt" about petitioner's guilt had far exceeded any reasonable bounds. The court nonetheless denied petitioner's repeated motions for mistrial and instead proceeded to remove the holdout juror, replacing her with an alternate who had observed this entire chain of events. Unsurprisingly, the alternate quickly joined the majority to convict petitioner on all counts. Applying a deferential abuse-of-discretion standard of review, the court of appeals accepted the district court's purportedly neutral explanation for removing the juror and affirmed.

1. Petitioner Bradley J. Stinn is the former CEO of Friedman's Jewelers, a publicly traded company that operated jewelry retail stores throughout the United States. In December 2007, a federal grand jury indicted Stinn on charges of securities fraud, 18 U.S.C. 1348; mail fraud, 18 U.S.C. 1341; and conspiracy to commit securities fraud, mail fraud, and wire fraud, 18 U.S.C. 1349. The government alleged that Stinn, in concert with other company executives, defrauded Friedman's investors by approving false statements about certain aspects of the company's accounting, including its treatment of accounts receivable.

The government's evidence against Stinn hinged squarely on the uncorroborated testimony of a single cooperating defendant—Friedman's disgraced former CFO, Victor Suglia. Suglia had pled guilty to two prior schemes of bank and accounting fraud while at Friedman's, including defrauding a vendor's lending institution. By Suglia's own admission, Stinn was not even aware of Suglia's other fraudulent schemes. Nonetheless, Suglia implicated Stinn in a third and unrelated scheme, testifying that Stinn personally directed Suglia in one-on-one meetings regarding the details of the fraudulent accounting scheme alleged by the government. No other witness testified to personal knowledge of these purported one-on-one meetings between Suglia and Stinn, nor did the government offer any documents, emails, or calendar entries to substantiate that the meetings took place. Nor was there evidence that Stinn ever sold a single share of Friedman's stock on the market so as to profit from his alleged fraud. For his testimony against Stinn, Suglia was rewarded with a sentence of probation, while Stinn was ultimately sentenced to 144 months in prison.

After a six-week trial, the jury initially reported that it was making "good progress" in its deliberations. App. 38a. After the second day of deliberations, however, the jury reported that deliberations were "at a standstill" because "one juror" had "made up his/her mind" and would "not change his/her opinion." App. 39a.

After four days of deliberations, the jury announced that it had reached a verdict on two of the three counts, though it remained deadlocked on the third count. App. 41a. Having been instructed that it could either return a partial verdict or continue its de-

liberations, the jury sent a note the following morning stating: "We are submitting our unanimous verdict on two counts." App. 42a. The note, however, also included the words "one juror," which had been scratched out, and stated that the "foreperson would like to speak to the judge in chambers." *Ibid.* The judge refused this request.

With the jury assembled in the courtroom to deliver its partial verdict, the foreperson announced that the unanimous verdict of the jury was guilty on Counts Two (securities fraud) and Three (wire fraud). App. 11a-12a. When polled, however, Juror 10 stated in open court that her verdict was not guilty. App. 12a-13a. The judge then sent the jury back to the jury room.

Government counsel, while acknowledging "I've never actually been in this situation before so I'm not sure what the right thing is," App. 13a, suggested giving an *Allen* charge. Stinn moved instead for a mistrial, arguing that "an *Allen* charge would be completely coercive" because "[w]e know who the [holdout] person is." App. 14a.

After Juror 10's dissent in open court, relations among the jury deteriorated further. The jury majority sent a note to the court attacking Juror 10: "We cannot continue deliberations since one juror agreed to the verdicts rendered and then recanted when in the courtroom. She refuses to engage in deliberations. Her integrity is questionable and we have acted in good faith. The foreperson must speak to the judge." App. 43a. Again, the judge refused this request.

Stinn renewed his motion for mistrial on the grounds that "it is a fair inference that the [holdout] juror has been or will be coerced," since "she has now

been singled out, identified in the courtroom as the person who has been difficult to the other jurors and it wasn't until she was in the courtroom that she felt that she could say it is not her verdict." App. 15a. The court denied the motion for mistrial.

Over Stinn's objection, the court then gave the jury an *Allen* charge. With full awareness that Juror 10 stood alone against an increasingly hostile eleven-member majority, the judge instructed the jury: "*[I]t is desirable that a verdict be reached*" and that each juror had a "sworn duty to consult with one another and to consider each other's views and to discuss the evidence." App. 15a-16a (emphasis added). The court added that "no juror should ever vote for any verdict unless after full discussion of the evidence that you heard and the legal instructions that I gave you it does represent his or her considered judgment in the case." App. 16a.

Immediately after delivering the *Allen* charge and sending the jury back for further deliberation, the court announced its intention to remove Juror 10 from the jury room to interview her about "her health." App. 16a-18a. The court informed trial counsel that Juror 10 had "on multiple occasions simply popped out of the jury room expressing her distress to the [court security officer]." App. 17a. The court observed: "Obviously she's under enormous strain that she—seems to me has to be vented by stepping outside the jury room which is quite inappropriate." App. 18a. The court then stated: "I feel that I need to be sure that this juror's *health* is not interfering with her ability to deliberate." App at 18a (emphasis added). After defense counsel noted that other jurors had also spoken with the court security officer and that Juror 10's "medical condition was a bro-

ken kneecap," as revealed during jury selection six weeks before, and not "an emotional, psychological medical condition," the court responded: "I don't know that it is a mental condition or a physical condition. She has some problem I think, some medical problem that required her to be in such distress that she came out of the jury room yesterday * * * ." App. 20a. Although defense counsel objected that singling Juror 10 out for an interview would imply "that there's something wrong with her in her deliberations," the court persisted with its plan. App. 21a-23a.

Before the "health" interview could take place, the jury sent a new note to the judge claiming that Juror 10 "had spoken to *an attorney* last night to determine which of the charges were the most serious," and that "any further deliberations are futile." App. 44a (emphasis added). In response to this message, the judge called Juror 10 into chambers. The interview revealed that the majority had seriously misrepresented the facts in making its accusation of Juror 10. The interview also made clear the now intolerable hostility the jury majority was exhibiting toward Juror 10 following her dissent in open court and the trial court's *Allen* charge.

In chambers, Juror 10 affirmed that she had *not* spoken to an attorney and did not "know any attorneys." App. 25a. Instead, Juror 10 had spoken only to her sister, a professor of Portuguese literature visiting from Brazil. App. 24a-25a. Juror 10, whose native language was Portuguese, asked her sister about the meanings of the words "fraud" and "conspiracy," without even mentioning the trial. App. 24a, 27a. Although Juror 10's sister tried to give Juror 10 examples, in Portuguese, of the terms "fraud" and "conspiracy," Ju-

ror 10 indicated that she was "a little confused" by her sister's explanation. App. 25a-26a.

Juror 10 did not share with the other jurors anything about the substance of her sister's examples of "fraud" and "conspiracy." App. 27a. She did, however, tell the other members of the jury: "[L]isten, I have a doubt." App. 27a. She explained to the court that, after she told the other jurors that she had "a doubt," the jury majority grew angry: "They started screaming with me, said I want you out of the jury. Whatever I was writing to the judge, explain I can't talk, nobody let me talk." App. 27a. Juror 10 then told the court: "I think we have such, you know, a huge issue now, I'm so uncomfortable inside now." App. 28a.

Immediately after the court's interview with Juror 10, Stinn again moved for a mistrial. App. 28a. The court denied the motion. *Ibid.* And despite Stinn's repeated requests, the court refused to give Juror 10 a curative instruction. App. 28a-31a. Instead, over Stinn's objection, the court removed Juror 10 from the jury, replacing the lone holdout in favor of innocence with an alternate juror. App. 30a-32a.

This alternate juror had witnessed not only Juror 10's dissent from the verdicts in open court, but also the *Allen* charge and the court's subsequent removal of Juror 10. App. 13a, 15a-16a, 31a-32a. The court gave no explanation why Juror 10 had been removed. App. 32a-33a. The jury then recessed for a three-day weekend.

Before the newly constituted jury began deliberations the following Monday, Stinn again moved for a mistrial. App. 34a-35a. The court again denied Stinn's motion. App. 36a. That afternoon, after deliberating for no more than a few hours, including a lunch break,

the jury returned with a guilty verdict on all three counts against Stinn. App. 36a-37a. The trial court sentenced Stinn to 144 months' incarceration.

2. On appeal, the Second Circuit affirmed Stinn's conviction applying an abuse-of-discretion standard of review. App. 5a.

First, Stinn argued on appeal that the trial court's "supplemental [*Allen*] instruction following the open-court dissent of Juror 10 during polling" violated his constitutional rights because it was impermissibly coercive. App. 4a. Focusing on the content of the *Allen* instruction itself, rather than the context in which it was delivered, per the law of the Second Circuit, the court of appeals held that the district court's *Allen* charge was not coercive because there was no "suggestion" in the jury instruction that "jurors in the minority should reconsider their position." App. 5a. The court did not address Stinn's argument that the context in which the instruction was given meant that the charge was necessarily directed at Juror 10, whose doubt about Stinn's guilt was the sole barrier to a verdict.

Second, Stinn argued that the district court's removal of Juror 10 was unconstitutional, given the court's awareness of the juror's status as the lone dissenter favoring acquittal, and that the court should have instead declared a mistrial. Stinn urged the court of appeals to apply heightened scrutiny to the district court's decision to dismiss Juror 10. The court of appeals, however, applied a deferential abuse-of-discretion standard and affirmed the district court's dismissal on the stated basis of "her communication with a third party regarding the case." App. 5a.

REASONS FOR GRANTING THE PETITION

This case presents two significant and related issues concerning the constitutional right to a jury trial under the Sixth Amendment. The courts of appeals are deeply divided on both issues. *First*, the issuance of an *Allen* charge after Juror 10 had been identified in open court as the lone holdout was inherently coercive and improper. As the government conceded below, under well-established Ninth Circuit precedent, giving an *Allen* charge in those circumstances violates the Sixth Amendment and constitutes *per se* reversible error. See, *e.g.*, *United States* v. *Williams*, 547 F.3d 1187 (9th Cir. 2008); *United States* v. *Sae-Chua*, 725 F.2d 530 (9th Cir. 1984). Several other courts of appeals likewise recognize, unlike the Second Circuit here, that an assessment of the *Allen* charge's coercive effect must take into account the *context* in which it is given.

Second, the court of appeals erred in accepting at face value the district court's explanation of its removal of Juror 10, when the evidence strongly suggested that Juror 10's view of the merits and status as the lone holdout played a substantial role in the events that led to her removal. Several courts of appeals have recognized the need to apply stringent scrutiny when there is a possibility that, despite a purportedly neutral stated basis for removal, the juror's removal may have been influenced by her view of the merits. See, *e.g.*, *United States* v. *Abbell*, 271 F.3d 1286 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002); *United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999); *United States* v. *Brown*, 823 F.2d 591 (D.C. Cir. 1987). As with the first question presented, the government has acknowledged the disagreement among the courts of appeals regarding the proper standard for analyzing the removal of

holdout jurors. See Brief for the United States in Opposition, *Warner* v. *United States*, 2008 WL 1957744 at *12 (April 25, 2008) (No. 07-977); see also Brief for the United States in Opposition, *Abbell* v. *United States*, 2002 WL 32135404 at *9 (August 21, 2002) (No. 01-1618).

"Like the requirement that juries consist of 12 men, the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century." *Apodaca* v. *Oregon*, 406 U.S. 404, 407, n.2 (1972). As recently as last Term, this Court observed that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials." *McDonald* v. *Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010).[1] "The reasoning that runs throughout this Court's Sixth Amendment precedents is that, in amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law." *Johnson* v. *Louisiana*, 406 U.S. 356, 370-71 (1972) (Powell, J., concurring).

At the time the Bill of Rights was adopted, "unanimity had long been established as one of the attributes of a jury conviction at common law." *Johnson*, 406 U.S. at 371 (Powell, J., concurring). The principle that a single dissenting juror prevents a defen-

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[1] Whether the Sixth Amendment's guarantee of unanimity, which is unquestioned in federal criminal cases, applies to state criminal proceedings through the Fourteenth Amendment is the question presented by another recently filed petition for certiorari. *Herrera* v. *Oregon*, *petition for cert. filed* (U.S. Sept. 9, 2010) (No. 10-344).

dant's conviction dates back as early as 1367. Jeffrey Abramson, *We The Jury: The Jury System and the Ideal of Democracy* 179 (1994). By the time the Bill of Rights was being debated and ratified, the requirement of unanimity was well established. Justice James Wilson—"who was instrumental in framing the Constitution and who served as one of the original Members of this Court," *Victor* v. *Nebraska*, 511 U.S. 1, 10 (1994)—wrote that "the undoubting and the unanimous sentiment of the twelve jurors" was of "indispensible necessity" to a criminal conviction. 2 James Wilson, *Works of the Honourable James Wilson* 350 (Philadelphia, Lorenzo Press 1804). Justice Wilson further explained that "[t]he consequence" of requiring unanimity "unquestionably is, that a single doubt or a single dissent must produce a verdict of acquittal." *Ibid.*

The Founders understood that jury unanimity serves as an essential check on government overreaching and as the ultimate protection against wrongful conviction of the innocent. John Adams observed that it was "not only the trial juror's right, but his duty, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." John Adams, Diary (Feb. 12, 1771), *in* 2 *The Works of John Adams* 3, 255 (AMS Press 1971) (Charles Francis Adams ed., 1850). These sentiments continued to prevail among the Constitution's advocates after the Bill of Rights was ratified. As Judge Hugh Henry Brackenridge of the Pennsylvania Supreme Court noted, where "*one* or more of the jury doubt so much as to stand out, after being kept together for a reasonable time, and no appearance of agreeing, it may be evidence that there is ground of doubt." Hugh Brackenridge, *Law Miscellanies* 192

(1814) (emphasis added). The Constitution's jury unanimity requirement therefore serves as a "corollary to the reasonable-doubt standard, both conceived as a means of guaranteeing that each of the jurors 'reach[es] a subjective state of certitude' with respect to a criminal defendant's culpability before rendering a conviction." *United States* v. *Correa-Ventura*, 6 F.3d 1070, 1076-1077 (5th Cir. 1993) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). See also Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 Cardozo L. Rev. 1417, 1432 (1997) ("One of the primary virtues of the unanimity rule is that it minimizes the potential for incorrect verdicts.").

A critical component of the right to a unanimous jury is that the trial court must refrain from any action that could coerce a juror's vote. In *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988), this Court unequivocally stated that any "criminal defendant * * * being tried by a jury is entitled to the uncoerced verdict of that body." *Id.* at 241. In that case, a state-court jury that had convicted the defendant of murder became deadlocked while deliberating on whether to sentence the defendant to death. The trial court polled the jury twice during sentencing deliberations, not as to their votes on the merits, but rather as to whether they believed further deliberations would be fruitful. After the second poll, which revealed a split of 11 jurors in favor of, and one juror against, continued deliberations, the court gave the jury an *Allen* charge; a half-hour thereafter, the jury returned a unanimous verdict sentencing the defendant to death.

In reviewing the defendant's claim that the jury "was improperly coerced" by the jury poll and subse-

quent *Allen* charge, this Court emphasized the need to review the trial court's actions "in its context and under all the circumstances." *Lowenfield*, 484 U.S. at 237 (quoting *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965) (*per curiam*)). *Cf. Brasfield* v. *United States*, 272 U.S. 448, 450 (1926) (When a trial court inquires as to a deadlocked jury's numerical split, "the inquiry itself should be regarded as ground for reversal" since "in general its tendency is coercive."). Stressing that the jury poll in *Lowenfield* was not as to the merits, but how the jurors "stood on the question of whether further deliberations might assist them in returning a verdict," this Court "h[e]ld that on these facts the combination of the polling of the jury and the supplemental instruction was not 'coercive' in such a way as to deny petitioner any constitutional right." *Lowenfield*, 484 U.S. at 240-241. The Court was quick to note, however, that by "so holding we do not mean to be understood as saying *other combinations* of supplemental charges and polling might not require a different conclusion." *Id.* at 241 (emphasis added).

Juror coercion undermines not only the specific Sixth Amendment right to trial by jury but also, more generally, the Fifth Amendment guarantee of due process. "Due process requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966) (prejudicial publicity surrounding petitioner's state criminal prosecution for murder prevented him from receiving fair trial consistent with Due Process Clause of the Fourteenth Amendment); see also *In re Murchison*, 349 U.S. 133, 136-137 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). The Court has recently affirmed that *both* the "Sixth

Amendment right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence 'based on the evidence presented in court.' " *Skilling* v. *United States*, 130 S. Ct. 2896, 2948 (2010) (quoting *Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961)); see also *United States* v. *McElhiney*, 275 F.3d 928, 937 n.4 (10th Cir. 2001) ("Arguably, an impermissibly coercive *Allen* instruction violates not only a defendant's right to due process but also a defendant's Sixth Amendment rights—more specifically, the right to an impartial jury trial and the right to a unanimous verdict.").

Since *Lowenfield*, the courts of appeals have disagreed considerably about whether a verdict-urging *Allen* charge is unconstitutionally coercive when delivered after the trial court has learned the identity of a specific dissenting juror. The circuits are also split with respect to the appropriate standard of review applicable to a district court's decision to remove a holdout juror whose identity has been divulged to the trial court.

The court of appeals' application in this case of a deferential abuse-of-discretion standard of review to the district court's holdout-targeting actions stands in stark conflict with circuit decisions exhorting heightened constitutional scrutiny where a trial court is privy to the identity of the jury dissenter on a deadlocked jury. This Court's review is necessary to resolve this deep divide in the lower courts and to clarify the scope of Sixth Amendment protection from actions by trial courts that target lone holdout jurors on deadlocked federal criminal juries.

I. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT REGARDING THE CONSTITUTIONALITY OF GIVING AN *ALLEN* CHARGE AFTER A HOLDOUT JUROR IS IDENTIFIED

A. The Judgment Below Directly Conflicts With Ninth Circuit Cases Holding That An *Allen* Charge Following Disclosure Of A Holdout Juror's Identity Is *Per Se* Coercive

Had Stinn, a long-time California resident, been tried in a district court in the Ninth Circuit, his conviction would have been reversed automatically under prevailing law.[2] Under the law of the Ninth Circuit, giving an *Allen* charge constitutes jury coercion and is *per se* reversible error when the charge "could only be read by the dissenting juror as being leveled at him." *United States* v. *Sae-Chua*, 725 F.2d 530, 532 (1984). Applying *Sae-Chua* to facts nearly identical to this case, the Ninth Circuit held that when "a juror clearly discloses to the district court that she disagrees with the rest of the jury and that she cannot return a different verdict, * * * the district court cannot give a supplemental instruction instructing the jury to continue deliberating." *United States* v. *Williams*, 547 F.3d 1187, 1207 (2008) (setting aside the convictions of three defendants).

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[2] Stinn twice moved to transfer the venue of his trial from the Eastern District of New York to the Northern District of California. The government opposed both requests, and the district court denied the motions.

As the facts of *Williams* demonstrate, the Ninth Circuit recognizes that the *context* in which an *Allen* charge is given can make clear that it is directed at the minority, thus rendering it coercive, even if the *language* of the charge seems facially neutral. In *Williams*, Juror 1 sent a note to the court stating that she disagreed with her fellow jurors and "can't get pass [sic] this issue." 547 F.3d at 1203. The defendants moved for a mistrial, but the district court instead delivered an *Allen* charge. Later that day, the jury convicted the defendants on all counts. On appeal, the Ninth Circuit observed that, just as the Second Circuit characterized the charge in the proceedings below, "the supplemental instruction given by the district court in response to [Juror 1's] note was a *neutral* variety of an *Allen* charge" in that it encouraged the jurors to reach a unanimous verdict "only if each of you can do so after having made your own conscientious decision." *Id.* at 1206 (emphasis added).[3] Although the language of the charge was not expressly directed to the minority jurors, the Ninth Circuit nevertheless found the *Allen* charge impermissibly coercive, because "the district court knew the identity of the holdout jurors when the *Allen* charge was given." *Ibid.* The court concluded that, even "when the judge * * * is inadvertently told of the jury's division," reversal is necessary when "the judge knew which jurors were the holdouts and each holdout juror knew that the judge knew he was a holdout." *Id.* at 1205.

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[3] The charge in this case is, if anything, more coercive than that in *Williams*, which stressed the need to adhere to each juror's "own conscientious decision." 547 F.3d at 1203. They are each set forth in full in the Petition Appendix. See App. 47a-49a.

The Ninth Circuit's ruling in *Williams* is a part of a larger trend, dating back nearly half a century, in which courts have gradually acknowledged that the original *Allen* charge's explicit focus on the "dissenting juror," *United States* v. *Allen*, 164 U.S. 492, 501 (1896), was improperly coercive. See, *e.g.*, *United States* v. *Flannery*, 451 F.2d 880, 883 (1st Cir. 1971); *United States* v. *Fioravanti*, 412 F.2d 407, 417 (3d Cir. 1969).[4] Those courts have recognized that a judge administering an *Allen* charge to a divided jury would naturally be perceived as targeting jurors in the minority, effectively directing their verdict. "[E]very juror * * * understands from the *Allen* charge that what the Judge wants is a verdict," and thus the dissenting juror, "fancying himself in opposition to the wishes of a United States Judge," acts only naturally "when he gets out of that unhappy predicament just as quickly as he can." *Thaggard* v. *United States*, 354 F.2d 735, 741 (5th Cir. 1965) (Coleman, J., concurring). As the Ninth Circuit's holding in *Williams* recognizes, a juror who has been identified to the trial court as the lone holdout will inevitably conclude that an *Allen* charge is directed at her refusal to agree to a verdict, even if the charge is not, by its text, expressly directed at the minority.

In contrast to the Ninth Circuit, the Second Circuit focuses almost exclusively on the *content* of an *Allen* charge, decoupled from any consideration of the *context* in which the judge delivered the charge. In *United*

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[4] While courts typically invoked their supervisory powers in abandoning the historical *Allen* charge, they were "motivated, at least in part, by a concern over the instruction's potential coercive effect." *United States* v. *McElhiney*, 275 F.3d 928, 939 (10th Cir. 2001).

States v. *Robinson*, 560 F.2d 507 (2d Cir. 1977), for example, the trial court delivered an *Allen* charge after learning that the jury was deadlocked eleven to one in favor of conviction, and after a juror informed the judge by note that "regardless of honest efforts of my co-jurors to persuade me, I am unable to reach a decision without a strong reasonable doubt." *Id.* at 512. Following the *Allen* charge, the holdout juror joined the jury majority, and the jury returned a unanimous guilty verdict. The Second Circuit affirmed, holding that the "the trial court did not abuse its discretion" in giving the *Allen* charge following revelation of the holdout juror's identity. *Id.* at 518. Focusing solely on the text of the charge, the Second Circuit found the charge "far short of being coercive" because of its "brevity and failure to mention any 'need' to reach a verdict, while studiously emphasizing the 'duty' to adhere to 'individual judgment' and 'individual conscience.' " *Id.* at 517.

In the decision below, the Second Circuit followed *Robinson* in holding that the *Allen* charge was not coercive, with no consideration of the context in which it was given. App. 5a. As in *Robinson*, the court of appeals focused on the wording of the charge and approved it because it found that its language did not instruct jurors in the minority to reconsider their position. *Ibid.*; see also *United States* v. *Ruggiero*, 928 F.2d 1289, 1299 (2d Cir. 1991) (approving *Allen* charge given after trial judge's interview of lone holdout juror because it included "the sort of cautionary language counselling jurors not to surrender any conscientiously held views that we have usually deemed to negate coercion."). Thus, the decision in this case continues the direct circuit split on the *Allen* charge issue.

In its briefing before the district court, the government recognized this circuit split, admitting that the Ninth Circuit has "held that the giving of an *Allen* charge is *per se* reversible error where the judge knows the identity of the holdout jurors and the holdouts are aware that he knows their identity." App. 45a. The government further conceded that *Williams* was "directly contrary to the Second Circuit's *en banc* decision in *Robinson*." *Ibid.* The Court should grant the petition for a writ of certiorari in order to resolve this conflict, which goes to the heart of the fundamental constitutional protections afforded by the right to a jury trial.

B. The Conflict Between The Second And Ninth Circuits Reflects A Broader Division Among Federal And State Courts As To The Propriety Of Delivering An *Allen* Charge Following Identification Of A Holdout Juror

The conflict between the Second and Ninth Circuits reflects a broader disagreement between the courts of appeals about the propriety of delivering an *Allen* charge *regardless of the wording* following disclosure of a minority juror's identity.

Like the Ninth Circuit, the Eleventh Circuit has recognized that the coercive effect of an *Allen* charge cannot be assessed without considering the context in which it was delivered. In *United States* v. *Chigbo*, 38 F.3d 543, 544 (11th Cir. 1994), the existence and identity of a lone holdout were revealed in a jury poll after the jury had announced that it had reached a unanimous guilty verdict. The next morning, the judge delivered an *Allen* charge. Following the charge, after about fifteen minutes of additional deliberation, the jury returned with a unanimous guilty verdict.

On appeal, the defendant argued that "the district court's modified *Allen* charge, coming after a poll which identified a dissenting juror, coerced the jury." *Chigbo*, 38 F.3d at 545. Applying a "totality of the circumstances" standard, the Eleventh Circuit held that an *Allen* charge delivered after a dissenting juror has been compelled to reveal herself in a jury poll will warrant reversal of a conviction if the court finds that "either the poll or the *Allen* charge, *or a combination of the two*, was inherently coercive." *Ibid.* (emphasis added).

Other circuits, like the Second Circuit, focus primarily on the language of the *Allen* charge, rather than its context, to determine whether the charge was improperly coercive. See *United States* v. *Knight*, 58 F.3d 393, 395-396 (8th Cir. 1995), cert. denied, 516 U.S. 1099 (1996) (holding that *Allen* charge following revelation of holdout's identity was not coercive because it did not "suggest that the jurors should surrender conscientious positions in light of the views of other jurors"); *Brooks* v. *Bay State Abrasive Products, Inc.*, 516 F.2d 1003, 1004 (5th Cir. 1987) (holding that *Allen* charge following jury poll dissent was not coercive given "the safeguards inherent in the language of the properly worded charge here under consideration").

The Sixth Circuit has gone even further. In *Lyell* v. *Renico*, 470 F.3d 1177 (6th Cir. 2006), a jury poll revealed that a single juror favored acquittal, while the others supported conviction. The court then gave a modified *Allen* instruction; within an hour, a unanimous guilty verdict followed. *Id.* at 1181. On appeal, the Sixth Circuit opined that the "possibility of unconstitutional coercion under these circumstances seems quite unlikely." *Id.* at 1183-1184. Indeed, the court went further to hold that any likelihood of coercion from the

original jury poll had been *reduced* by the trial court's subsequent *Allen* charge, because it "urged each of [the jurors] not to 'give up their ideas or thoughts,' " and told them that they "retained the right to disagree with one another." *Id.* at 1184.

This same division among federal courts is also reflected in the disagreement among state supreme courts, which have grappled with similar concerns, though not expressly in terms of the Sixth Amendment. The District of Columbia Court of Appeals has agreed with the Ninth Circuit and, like it, has rejected the Second Circuit's analysis in *Robinson*. See *Smith* v. *United States*, 542 A.2d 823, 826 (1988) ("[T]he *Robinson* court gave undue weight to the instruction's brevity and failure to mention any need to reach a verdict, ignoring the factors which the Ninth Circuit found inherently coercive in *United States* v. *Sae-Chua*.") (internal quotation marks and citations omitted). The D.C. Court of Appeals acknowledges that, where a jury has revealed its split, an *Allen* charge has "great potential for coercing a verdict" because such an instruction " 'may be interpreted by the minority as an implied command to agree with the majority.' * * * The pressures upon the lone dissenter who is revealed in open court are the same in each case." *Benlamine* v. *United States*, 692 A.2d 1359, 1363, 1365 (1997) (quoting *Smith*, 541 A.2d at 820). Thus, when a verdict-urging jury instruction is challenged, the D. C. Court of Appeals, like the Ninth and Eleventh Circuits, will "examine the surrounding *circumstances* to decide whether the instruc-

tion was coercive." *Smith*, 542 A.2d at 825 (emphasis added).[5]

Many other states similarly look beyond the language of the instruction itself in considering whether the context makes an *Allen* charge coercive, including specifically whether the court was aware of the numeric split of the jurors when it issued an anti-deadlock instruction. See, *e.g.*, *State* v. *McCutcheon*, 723 P.2d 666, 669 (Ariz. 1986) (noting that "[w]hen the numerical division is known, particularly if the division is lopsided, encouraging the jury to decide can amount to coercion"); *State* v. *Kaiser*, 504 N.W.2d 96, 100 (S.D. 1993) ("[T]he jury's knowledge that the court is aware of how they stand can have the 'doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority.' "); *State* v. *Luanglath*, 863 A.2d 631, 643-644 (R.I. 2005) ("[E]ven if the trial justice did not specifically single out the only dissenter, her instructions, coupled with the knowledge of the single holdout, took on a new meaning."); *Thomas* v. *State*, 748 So. 2d 970, 977 (Fla. 1999) (the jury's announcement in open court of their split vote, indicating a lone holdout, contributed to "undue pressure upon the lone holdout juror to change his or her vote.").

By contrast, at least two state courts join the Second Circuit in focusing on whether the language of

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[5] Although the District of Columbia would be subject to the full force of the Sixth Amendment, even if the States are not, the D.C. Court of Appeals has analyzed this issue under the rubric of its supervisory powers. This analysis, however, is self-evidently interlaced with Fifth and Sixth Amendment concerns about jury coercion. See *Harris* v. *United States*, 622 A.2d 697, 701-706 (D.C. Ct. App. 1993).

the *Allen* instruction adheres to a particular form, without regard to the context in which it is given. See, *e.g.*, *Commonwealth* v. *Greer*, 951 A.2d 346, 360 (Penn. 2008) ("[W]e are not persuaded by the argument that the fact that the court knew the nature of the jury's numerical division and the identity of the holdouts (here, via volunteered information from the jury forewoman) can make an otherwise non-coercive *[Allen]* charge coercive."); see also *Graham* v. *State*, 601 A.2d 131, 138 (Md. 1992) (holding that it was not error for a trial judge to give a modified *Allen* charge after the jury had voluntarily revealed its numerical division where the charge adhered to the form approved in the State).

Although these state courts have not, in light of the *Apodaca* decision, addressed the impact of an *Allen* charge on a lone holdout juror in Sixth Amendment terms, their analysis reflects a sensitivity to the risk of jury coercion, a concern with constitutional implications. See, *e.g.*, *Kaiser*, 504 N.W.2d at 101 ("Since the jury trial is a fundamental right in the American system of justice, any potential coercion on the minority requires close scrutiny.").

C. The District Court's Ultimate Removal Of Juror 10 Did Not Moot The Court's Error In Giving The Coercive *Allen* Charge

Contrary to the government's argument in the court of appeals, the district court's ultimate removal of Juror 10 did not eliminate the coercive effect of the improper jury charge. As discussed below, Juror 10's removal was itself improper and, at least in part, caused by the improper *Allen* charge that further emboldened the hostile jury majority to make exaggerated accusa-

tions against the lone dissenter. Moreover, the continued coercive effect of the *Allen* charge is evident from its manifest impact on the alternate juror who replaced Juror 10.

The alternate juror witnessed all that transpired, including Juror 10's dissent, the court's *Allen* charge—which all jurors would have perceived as directed at Juror 10—and the trial judge's subsequent dismissal of Juror 10 from the jury. Because the court gave the jurors no explanation for the removal, the new juror was left to surmise that Juror 10 had been removed because she defied the court's verdict-urging instruction and to permit the jury to render a verdict. Indeed, the newly constituted jury returned a unanimous guilty verdict within a few hours of supposedly restarting deliberation from the beginning, despite the fact that the trial had lasted six weeks, followed by a week of deliberations.

The brevity of the jury's deliberations following the seating of the alternate, who had been influenced by the *Allen* charge, is strong evidence of the charge's continuing coercive effect on the alternate juror. See, *e.g.*, *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 462 (1978) ("[T]his swift resolution of the issues in the face of positive prior indications of hopeless deadlock, at the very least, gives rise to serious questions in this regard."); *Lowenfield* v. *Phelps*, 484 U.S. 231, 240 (1988) ("We are mindful that the jury returned with its verdict soon after receiving the supplemental instruction, and that this suggests the possibility of coercion.") (citing *United States Gypsum Co.*, 438 U.S. at 462).

Rather than giving an *Allen* charge, the district court should have declared a mistrial. See *Arizona* v.

Washington, 434 U.S. 497, 509 (1978) (noting propriety of declaring a mistrial where there is "a significant risk that a [final] verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors"); see also *Renico* v. *Lett*, 130 S. Ct. 1855, 1863 (2010) (quoting *Arizona* v. *Washington*, *supra*); *Sanders* v. *Lamarque*, 357 F.3d 943, 944 (9th Cir. 2004) ("The protection of holdout jurors from coercion has been a fundamental part of our federal jurisprudence."). The subsequent removal of Juror 10 and her replacement with an alternate who was similarly coerced does not negate the district court's erroneous failure to declare a mistrial.

II. The Court Should Grant Certiorari To Resolve The Circuit Split Regarding The Standard For Reviewing The Removal Of A Known Dissenting Juror

A. The Circuits Are Divided On The Standard For Reviewing A Juror's Removal Where The Juror's View Of The Merits Possibly Influenced Her Removal

The Ninth, Eleventh, and District of Columbia Circuits have recognized that allegations of "misconduct" directed at known holdout jurors cannot properly be taken at face value, given the inherent risk that the jury majority and the trial court alike may, whether deliberately or inadvertently, construe the holdout juror's principled resistance to conviction as a refusal to follow instructions.

In *United States* v. *Symington*, 195 F.3d 1080 (1999), the Ninth Circuit reversed the defendant's fraud conviction because there was considerable evidence that, during the jury's deliberations, "the other jurors'

frustrations with [the holdout juror] derived primarily from the fact that she held a position opposite to theirs on the merits of the case," and that those frustrations "manifest[ed] themselves in concerns about [her] reasonableness or general capacity as a juror." *Id.* at 1087-1088. The Eleventh Circuit has similarly noted "the danger that a dissenting juror might be excused under the mistaken view that the juror is engaging in impermissible nullification," and that the court must therefore "apply a tough legal standard" with respect to dismissals of jury dissenters. *United States* v. *Abbell*, 271 F.3d 1286, 1302 (2001), cert. denied, 537 U.S. 813 (2002).

Given the unique interplay of incentives and pressures surrounding minority jurors on a deadlocked jury, the Ninth and District of Columbia Circuits have each mandated probing scrutiny of a trial court's decision to remove a holdout juror for alleged "misconduct." See *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987) ("We agree with the appellants that a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence* * * [I]f the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request.") (emphasis added); *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) ("We hold that if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Under such circumstances, the trial judge has only two options: send the jury back to con-

tinue deliberating or declare a mistrial.") (emphasis in original). The Eleventh Circuit has similarly observed that a dissenting juror "should be excused" by a trial court "only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." *Abbell*, 271 F.3d at 1302. The court further clarified that the terms "substantial possibility" and "any possibility" are "interchangeable" in this context. *Id.* at 1302 n.14.

In contrast to its sister circuits, the Second Circuit in this case applied a deferential abuse-of-discretion standard, rather than a mixed-motive analysis designed to scrutinize the reasonable possibility that Juror 10's removal in this case was motivated not by her refusal to deliberate on the merits, but rather by her harboring a reasonable doubt about the defendant's guilt. See App. 4a-5a ("[W]e cannot say that the District Court committed error or 'abused its discretion' " in removing the single holdout for acquittal.). Applying this deferential standard, the Second Circuit held that "the district judge reasonably concluded that Juror 10's 'extremely serious misconduct' warranted her dismissal." App. 5a.

Once again, the conflict between the Ninth and D.C. Circuits, on the one hand, and the Second Circuit, on the other, is merely the most glaring evidence of a broader split among the lower courts. In *United States* v. *Edwards*, 303 F.3d 606 (2002), cert. denied, 537 U.S. 1192 (2003), the Fifth Circuit held that heightened scrutiny "extends only to those dismissals [of holdout jurors] where the juror's conduct cannot be evaluated without delving into the reasons underlying the jurors' views of the case." *Id.* at 633. The court applied deferential review, however, to facially plausible findings of juror "inability or unwillingness to follow instructions."

Id. at 632. The Seventh Circuit appears to apply a similar standard. See *United States* v. *Warner*, 498 F.3d 666, 690 (2007) ("The district court, based on its assessments of the jury's notes to the court, concluded that there was no concerted effort to remove any juror based on her viewpoint. This conclusion, which is supported by the record, provides all the basis this court needs to affirm the district court's decision to order substitutions of jurors."), cert. denied, 128 S. Ct. 2500 (2008).

As they are on the *Allen* charge issue, the courts of appeals are divided about the proper standard of review that should be applied to a trial judge's removal of a lone holdout juror. The Court should grant certiorari in this case to clarify that standard and provide guidance to the lower courts.

B. The Second Circuit's Abuse-Of-Discretion Review Was Inadequate Given The Strong Possibility That Juror 10's Removal Was Based On Her View Of The Merits

Stringent scrutiny of Juror 10's removal was even more essential in this case because "[t]he presence of a holdout lends heightened significance to the district court's duty of inquiry." *United States* v. *Ginyard*, 444 F.3d 648, 654 (D.C. Cir. 2006). The eleven-person majority's frustration toward Juror 10 was obvious, manifesting itself in open hostility and even a patently inaccurate accusation of misconduct. After Juror 10 dissented from what the foreperson had described as a unanimous guilty verdict, the majority's frustration boiled over in a note impugning Juror 10's "integrity" because she "recanted when in the courtroom." App. 43a. Even more disturbingly, the trial judge began to consider

removing Juror 10 after she openly refused to acquiesce to the will of the majority favoring conviction—and before any external communication was even mentioned. After delivering the *Allen* charge to the 11-1 split jury, the judge suggested *sua sponte* that Juror 10's "health" might require her removal. The court observed that Juror 10 was "under enormous strain," App. 18a, and that she was "in such distress that she came out of the jury room" to speak to the court security officer, App. 20a. The court failed to acknowledge the substantial possibility, if not likelihood, that Juror 10's distress resulted directly from the pressure exerted by the hostile jury majority to go along with the majority's verdict—a pressure that was heightened by the *Allen* charge. Instead, the judge attributed Juror 10's behavior to medical problems—despite that the only health issue Juror 10 identified during voir dire was a prior knee problem, not a mental or psychological issue—and proposed to single her out for scrutiny and possible removal.

Underscoring the pressure that the jury majority exerted on Juror 10 was the revelation that the majority completely misrepresented to the trial court the nature and extent of Juror 10's conversation with her sister (which the majority mischaracterized as a conversation with an attorney). App. 24a-28a. Juror 10 described to the judge how, upon hearing that she had "a doubt" about Stinn's guilt, the majority started "screaming" at her, that "nobody let [her] talk," and that the jurors favoring conviction told Juror 10, in no uncertain terms: "I want you out of the jury." App. 27a.

Upon receiving this information, the trial court should have declared a mistrial. Alternatively, the judge could have given a standard cautionary instruc-

tion directing Juror 10 to disregard her conversation with her sister, the substance of which Juror 10 did not divulge to the other jurors. Such an instruction would very likely have been followed by Juror 10 in light of her indication that she was "a little confused" by her sister's examples. App. 26a.[6]

Instead, the trial court improperly granted the jury majority's wish, silencing a juror known to harbor a reasonable doubt about Stinn's guilt. App. 27a, 31a-32a. The trial court's failure to give serious consideration to a curative instruction exemplifies the court's failure to perceive the serious risk that the events leading to Ju-

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[6] Such cautionary instructions have routinely been found sufficient to cure juror misconduct in the particular context of extrinsic consultation regarding the meaning of legal terms. See, *e.g.*, *United States* v. *Turner*, 936 F.2d 221, 226-227 (6th Cir. 1991) (trial judge "took the necessary steps to insure against any potential prejudice resulting from the jury's use of the dictionary" by instructing jury that "they had improperly consulted the dictionary and were to disregard any definition they had read."); *United States* v. *Duncan*, 598 F.2d 839, 866 (4th Cir. 1979), cert. denied, 444 U.S. 871 (1979) (trial judge properly allowed jury deliberations to proceed even after "one member of the jury had been arguing Webster's definitions of 'motive' and 'intent,'" since court found that foreman "had immediately told the group that they were to rely on the court's instructions, not on the dictionary definition."); *United States* v. *Steele*, 785 F.2d 743, 745-746 (9th Cir. 1986) (no error to permit deliberations to proceed after several jurors "consulted the dictionary for the definition of the words 'conspiracy,' 'conspirator,' 'concerted,' 'copyright,' 'infringement,' 'plagiarism,' and 'doubt,'" since judge "conducted an evidentiary hearing" and found that jurors "did not use the dictionary to formulate their own legal standards," but only "to determine the meaning of words.").

ror 10's discharge were the direct result of her "doubt" regarding the strength of the government's case.

By removing Juror 10, whom the judge, the jury majority, *and* the alternate juror knew was the lone dissenter in favor of acquittal, the district court effectively directed a guilty verdict against Stinn. The speed with which the reconstituted jury reached a verdict after Juror 10's dismissal makes this painfully clear. See *supra* at 9. Under these circumstances, the standard of review adopted by the Ninth and D.C. Circuits would have mandated a searching analysis in which "*any possibility*" that Juror 10's removal was based on her view of the government's evidence would have required reversal of Stinn's convictions. *Brown*, 823 F.2d at 596 (emphasis added). Applying heightened scrutiny, the court of appeals would have concluded that the district court's failure to give a curative instruction was influenced by Juror 10's continued insistence that she had "doubt" about the government's case. In contrast, the Second Circuit applied an expressly deferential standard of review and affirmed the convictions—a standard of review that pretermitted any serious inquiry into the trial judge's reasons for dismissing Juror 10.

* * * * *

This Court has long recognized that a unanimous verdict, rendered by an impartial jury, is so central to the fairness of a federal criminal trial that, if only a single juror's vote is improperly compromised, the resulting denial of the defendant's constitutional rights under the Sixth Amendment is as pernicious as if the entire jury were so prejudiced. A trial judge's removal of a holdout juror who has been falsely impugned by the

jury majority for expressing "a doubt" about the government's case goes to the very core of the Constitution's guarantees. See *Blakely* v. *Washington*, 542 U.S. 296, 313-314 (2004) ("The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' * * * rather than a lone employee of the State.") (quoting 4 William Blackstone, *Commentaries* 343). The right to unanimity is sometimes embodied in a conscientious individual who has a doubt about the defendant's guilt and refuses to convict. When a judge joins a hostile majority in pressuring or even removing that juror, that lonely voice is silenced, and the entire jury process is corrupted. This results in error of constitutional dimensions and a manifest injustice.

The Court should grant a writ of certiorari because the courts of appeals are deeply divided on the two questions presented in this petition. Since raising the question in *Lowenfield*, this Court has not issued guidance about when a trial judge may issue an *Allen* charge to a jury that she knows contains a sole holdout juror. The courts of appeals have also begun to fashion differing, inconsistent standards of review to be applied to trial judges' removals of holdout jurors. This Court should resolve these splits among the circuits on fundamental Sixth Amendment issues.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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OCTOBER 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES of America,
Appellee,
v.
Bradley STINN,
Defendant-Appellant.

No. 09-2002-cr

May 26, 2010

Scott B. Klugman, Assistant United States Attorney (Susan Corkery, Assistant United States Attorney, of counsel, Benton J. Campbell, United States Attorney, on the brief) Office of the United States Attorney for the Eastern District of New York, Brooklyn, NY, for appellee.

Present JOS A. CABRANES and ROBERT A. KATZMANN, Circuit Judges, J. GARVAN MURTHA, District Judge.*

* The Honorable J. Garvan Murtha, Senior Judge of the United States District Court for the District of Vermont, sitting by designation.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be AFFIRMED.

Defendant-appellant Bradley Stinn ("defendant" or "Stinn") was convicted after a jury trial of conspiracy to commit mail, wire, and securities fraud, in violation of 18 U.S.C. § 1349, securities fraud, in violation of 18 U.S.C. § 1348, and mail fraud, in violation of 18 U.S.C. § 1341. In addition to ordering him to forfeit $1,019,000, the District Court imposed a sentence principally of 144 months' imprisonment, three years of supervised release, and $4,393,575 in restitution. Defendant now appeals his conviction, contending that (1) the District Court erred in giving the jury a conscious avoidance instruction, and (2) the individual or cumulative effect of the District Court's rulings during jury deliberations coerced a guilty verdict. We assume the parties' familiarity with the remaining facts, procedural history, and issues on appeal.

Defendant first contends on appeal that the District Court erred in giving the jury a conscious avoidance instruction. "Courts in this Circuit commonly give the jury a conscious avoidance instruction 'when a defendant claims to lack some specific aspect of knowledge necessary to conviction but where the evidence may be construed as deliberate ignorance.'" *United States v. Reyes*, 302 F.3d 48, 55 (2d Cir.2002) (quoting *United States v. Gabriel*, 125 F.3d 89, 98 (2d Cir.1997)).

Such an instruction is warranted when (1) the defendant asserts a lack of some specific aspect of knowledge required for conviction, and (2) the appropriate factual predicate exists. *See United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir.2003); *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir.2003). A conscious avoidance charge need not be based on direct evidence but, rather, may be based on circumstantial evidence showing that the "surrounding circumstances were such that reasonable persons could have concluded that the circumstances alone should have apprised defendants of the unlawful nature of their conduct." *United States v. Civelli*, 883 F.2d 191, 195 (2d Cir.1989) (internal quotation marks and citation omitted).

Stinn asserted at trial that he lacked some specific aspect of knowledge required for conviction, so the only question remaining is whether the appropriate factual predicate exists warranting a conscious avoidance charge. We have held that a factual predicate for giving a conscious avoidance instruction exists if there is evidence from which rational jurors may conclude beyond a reasonable doubt that "the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir.1995) (internal quotation marks and citation omitted). Stinn primarily contends that the charge was inappropriate because the government asserted that he orchestrated the fraud and therefore had actual knowledge-so, Stinn's view, he could not possibly have "avoided" knowing the facts in dispute. But we have held that a conscious avoidance instruction is proper even where the government's primary theory is that defendant had actual knowledge.

See, e.g., id. ("Such an instruction is not inappropriate merely because the government has primarily attempted to prove that the defendant had actual knowledge, while urging in the alternative that if the defendant lacked such knowledge it was only because he had studiously sought to avoid knowing what was plain.").

Because Stinn's knowledge was "plainly ... in dispute" at trial, *see id.*, we cannot conclude that the District Court erred in giving the conscious avoidance instruction. We determine here that a rational juror could have concluded, based on the evidence of the circumstances surrounding the accounting manipulations, that if Stinn did not have actual knowledge of the illegality, "it was only because he deliberately avoided confirming his suspicion." *United States v. Carlo*, 507 F.3d 799, 802-03 (2d Cir.2007).

Moreover, even assuming *arguendo* that giving such an instruction was error, that error would be harmless in the face of overwhelming testimony and documentary evidence supporting the jury's conclusion that Stinn was guilty of the charged crimes.

Defendant next argues that the individual or cumulative effect of the District Court's rulings during jury deliberations coerced a guilty verdict. Specifically, defendant challenges the court's supplemental instruction following the open-court dissent of Juror 10 during polling; the court's subsequent dismissal of Juror 10, based on the juror's refusal to deliberate and her attempt to secure outside advice on the meaning of concepts fundamental to the case; the court's subsequent

addition of Alternate 1 to the jury with Stinn's consent; and the cumulative effect of these rulings. Based on a review of the record as a whole, we cannot say that the District Court committed error or "abused its discretion" in making these rulings.

Stinn contends that the District Court's supplemental charge to the jury regarding the refusal of Juror 10 to deliberate was a coercive "*Allen*" charge. We disagree, because there was no "suggestion that jurors in the minority should reconsider their position." *Spears v. Greiner*, 459 F.3d 200, 204 n.4 (2d Cir.2006) (citation omitted). Moreover, the defendant himself had suggested that the Court remind the jury of their duty to deliberate after first learning of the refusal of Juror 10 to do so.

We likewise do not conclude that the District Court "abused its discretion" in removing Juror 10 pursuant to rule 23(b)(3) of the Federal Rules of Criminal Procedure, which provides that "[a]fter the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict ... if the court finds good cause to excuse a juror." *United States v. Simmons*, 560 F.3d 98, 109 (2d Cir.2009). After questioning Juror 10 about her communication with a third party regarding the case, the district judge reasonably concluded that Juror 10's "extremely serious misconduct" warranted her dismissal. Gov't App. 225. [T]here is no evidence that Juror 10 was removed due to her holdout status. *See United States v. Baker*, 262 F.3d 124, 131 (2d Cir.2001) (affirming the removal of a juror who "was not removed for her nonconforming view of the evi-

dence[,][but] for her admitted refusal to perform her duty as a juror by deliberating together with the other jurors").

As far as the substitution of Alternate 1, it bears recalling that defendant did not object to either action in the District Court. Accordingly, these contentions are subject only to plain error analysis. *See, e.g., United States v. Delano,* 55 F.3d 720, 726 (2d Cir.1995). We cannot say that the District Court's actions were plain error under current law, or that they affected the "substantial rights" of defendant. *See, e.g., United States v. Bayless,* 201 F.3d 116, 127-28 (2d Cir.2000). First, Stinn does not dispute that Judge Gershon complied with Rule 24(c)(3) of the Federal Rules of Criminal Procedure in replacing Juror 10 and "instruct[ing] the jury to begin its deliberations anew." Further, as Stinn concedes, the substitution of an alternate juror was certainly not more coercive than proceeding with the 11 jurors who had already voted to convict.

CONCLUSION

We have considered each of defendant's arguments on appeal and find them to be without merit.

For the reasons stated above, we AFFIRM the judgment of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America,
Plaintiff,
v.
Bradley STINN,
Defendant.

Case Number CR 07-113 (NG)

Judgment in a Criminal Case

May 4, 2009

[1] THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) which was accepted by the court. _____

X was found guilty on count(s) one, two, and three which after a plea of not guilty. of the second superceding indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1349	Conspiracy to commit securities fraud, mail fraud, and wire fraud, a class C felony	December 2003	1
18 USC § 1348	Securities fraud, a class C felony	December 2003	2
18 USC § 1341	Mail Fraud, a class C felony	September 2003	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

X Count(s) All open counts in prior indictments
☐ is X are dismissed.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 29, 2009
Date of Imposition of Judgment
s/NG
Signature of Judge

Nina Gershon, USDJ
Name and Title of Judge

May 4, 2009
Date

[2] IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Twelve (12) years concurrent on each count.

X The court makes the following recommendations to the Bureau of Prisons:

Designate the defendant to a facility near San Francisco, CA

☐ The defendant is remanded to the custody of the United States Marshal.

X If an institution has not been designated, the defendant shall surrender to the US Marshal for the Northern District of California:

X at 12 noon ☐ a.m. ☐ p.m. on June 29, 2009

☐ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

X before 12 noon on June 29, 2009.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on

_____ to

_____ a

_____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

* * *

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America,
Plaintiff,
v.
Bradley STINN,
Defendant.

Case Number CR 07-113 (NG)

Transcript of Proceedings for March 20, 2008

[4613] * * * THE COURT: Good morning, members of the jury. I have your note dated 3/20/08, it reads as follows:

Your Honor, we are submitting our unanimous verdict on two counts. We still need further instructions on one count. The foreperson would like to speak to the judge in chambers. Signed by The Foreperson.

First, I understand your note to indicate that you are prepared to give us a partial—what I called yesterday a partial verdict as to two counts. Ms. Spencer Phillip; is that correct?

THE FOREPERSON: Yes, ma'am.

THE COURT: Is the jury unanimous as to those two counts?

THE FOREPERSON: Yes.

[4614] THE COURT: All right. May I see the verdict sheet please.

THE CLERK: The verdict sheet is being handed up to the Court.

(Pause.)

THE COURT: Yes, the verdict sheet is in order as to Counts Two and Three.

So, Ms. Spencer Phillip, I'm going to read the questions and ask you to give the jury's answer.

As to Count Two, how do you find the defendant on Count Two, securities fraud?

THE FOREPERSON: Guilty.

THE COURT: And if you find the defendant guilty, which you did, do you find venue for Count Two?

THE FOREPERSON: Yes.

THE COURT: And how do you find the defendant on Count Three, mail fraud?

THE FOREPERSON: Guilty.

THE COURT: And if you find the defendant guilty, do you find venue for Count Three?

THE FOREPERSON: Yes.

THE COURT: All right then, Victor, would you take the verdict sheet.

And I'm going to do something that we call polling the jurors.

[4615] Have all the jurors heard the verdict as announced by the foreperson?

A JUROR: Yes.

THE COURT: All right then, I'm going to ask each of you whether or not that is your verdict as to Counts One and Two – excuse me, Counts Two and Three. * * *

[4616] * * * THE COURT: And Juror Number Ten, is that your verdict?

JUROR NO. 10: No, Your Honor.

THE COURT: And then I think we need to send the jury back into the jury room and we'll consult with counsel and the jury should continue its deliberations. Let me just tell you that I will have some further instructions for you in a few minutes and we'll proceed from there.

THE CLERK: All rise.

(Jury leaves courtroom.)

THE CLERK: Thank you. Please be seated in the back.

THE COURT: Counsel.

MR. SHAPIRO: I'd like to think for ten minutes but I believe I'm going to be asking you for mistrial, Your Honor.

MR. KLUGMAN: Well, we're certainly not at that stage. Your Honor hasn't even given them an *Allen* charge yet. We're not at the stage of a mistrial. There's been— obviously the issue is really what do we do about the, you know, the foreperson's request, what do we do about the two jurors who came out of the room because obviously something is [4617] unusual, so, but clearly mistrial is not where we are right now. We haven't even given the jury an *Allen* charge on any of the counts and I've never actually been in this situation before so I'm not sure what the right thing is either.

* * *

[4618] * * * MR. KLUGMAN: My view is we should do absolutely nothing right now, that they gave this note, obviously something happened that wasn't indicated in the note and they'll let us know what's going on in another note and we should do nothing until we hear from them again.

MR. SHAPIRO: Well, I disagree, Your Honor. I think [4619] you have to declare a mistrial. I think we've had now, oh, I know we've had, what, four days of deliberations or four and a half days of deliberations. They have obviously had disagreements about the evidence. We've seen the disagreements reflected in some of the notes. We've seen it reflected as sometimes being characterized as a juror not willing to deliberate and other times the notes indicating that they were deliberating but that there were disagreements about the strength of the government's case.

At this point an *Allen* charge would be completely coercive. We know who the person is, we know what the vote was or close to what the vote was, I don't think you ended up polling the last two jurors but—

THE COURT: I think the case law suggests that one not continue once you find out that there's even one because that might be considered more coercive because now I don't know, Jurors Number 11 and 12, that might not have been their vote either.

MR. SHAPIRO: That's right, Your Honor. However, I think the history of the notes suggest that it was Juror Number Ten and now we know what her vote is and we now know what at least the other nine—

THE COURT: Just a moment.

(Pause.)

THE COURT: Counsel, let me just take another ten [4620] minutes and I'll hear from you. * * *

[4621] * * * THE COURT: Counsel, we've received another note. What are we calling that, Victor?

THE CLERK: 16.

THE COURT: Would you give these copies to counsel please.

(Pause.)

THE COURT: All right, counsel.

MR. SHAPIRO: Your Honor, I had made a motion for mistrial, I continue that motion. I think that the fact is that the jury cannot reach a verdict. There is one juror who disagrees with the other jurors. The other jurors may characterize it as that she is refusing to engage in deliberations but we know they have been deliberating for days.

At this point I think it is a fair inference that the juror has been or will be coerced if you—if they deliberate, if you order the jury to continue to deliberate and if you—

THE COURT: Why would it be coercive?

MR. SHAPIRO: Because she has now been singled out, identified in the courtroom as the person who has been difficult to the other jurors and it wasn't until she was in [4622] the courtroom that she felt that she could say it is not her verdict. * * *

[4634] * * * THE COURT: Members of the jury, for the time being I want to give you this additional instruction. First, I need to tell you how grateful I am to you for all the work that you are putting into the case, many weeks of trial and now the deliberations. I understand and I want you to understand that it is not uncommon how much strain it is on each person to be here for a long period of time, to struggle together during deliberations. Each of you has worked very hard and I can see that and I have a great deal of respect for the amount of work and time and effort that each [4635] of you is putting into this. This case, as I think is obvious, is important both to the government and to the

defendant and it is s [sic] desirable that a verdict be reached. As I've also just said now, it is such hard work to deliberate and I understand that. It is, I assure you, it is normal and it is common for jurors to have differences and for there to be strains during deliberations. Frequently, however, we find that after extended discussions jurors may well reach agreement. Of course, this process of deliberations requires that each and every juror fulfill his or her sworn duty to deliberate and to discuss the case respectfully with each other, as I instructed you from the beginning. When the jurors enter the jury room, it is their sworn duty to consult with one another and to consider each other's views and to discuss the evidence. I want to emphasize, of course, that although each of you has the duty to deliberate, that is to exchange views, no juror should ever vote for any verdict unless after full discussion of the evidence that you heard and the legal instructions that I gave you it does represent his or her considered judgment in the case. I remind you to consider all of my instructions as a whole and that the government bears the burden of proof beyond a reasonable doubt as to each element of each crime charged. So, thank you very much and I'm going to ask you to [4636] return to your deliberations.

THE CLERK: All rise.

(Jury leaves courtroom.)

THE COURT: All right, counsel, come up again please. Let me advise you of what I have been thinking about. I've been thinking of inviting Juror Number Ten into the robing room with counsel and the reporter to discuss not her deliberations or her views but her health. This is the juror who earlier in the case became ill and faint and we had to stop the trial for a while.

I've now checked the jury selection because Mr. Shapiro mentioned something about her health in jury selection and sure enough, this is the juror who is a medical assistant and she said that she had just returned to work after being on disability for three and a half months for a broken kneecap. She's also the juror—I don't know entirely what the significance of this is but she is the juror who walked in in the back, if you recall we were interviewing jurors in the jury room and she had gotten out of order in the line-up and my—it was a student intern actually who was helping me out and said, I think the name was Nareba Hardy, and this juror did not correct her with giving her the right name and only after we were involved in the jury selection for a while did we realize we didn't have the right name connected [4637] to the right juror.

In any event, this is also the juror who last night ran out of the jury room saying that she had to get home to get her medicine. This was before 5:30 and the jurors know that we sit between five and 5:30. I hadn't known that before but I checked into that today and my deputy was told that by the CSO that that is the same juror. Although, the CSO told this juror that she has to put any communications to the Court in writing, she never followed that instruction and I've never received a note from her. Rather, she has on multiple occasions simply popped out of the jury room expressing her distress to the CSO.

As I said earlier this afternoon, I've been advised that when the new unmarked verdict sheet was submitted to the jury by the CSO, once again this juror just pops out of the jury room and tells the CSO that the jury cannot deliberate. Obviously she's under enormous strain that she—seems to me has to be

vented by stepping outside the jury room which is quite inappropriate.

I think also her demeanor during the polling of the jury requires some attention and I noted it. I feel that I need to be sure that this juror's health is not interfering with her ability to deliberate.

MR. SHAPIRO: Your Honor, I recall the mix-up in the sequence of events. My recollection is that it wasn't [4638] clear that whoever was announcing the names was announcing them loudly and I think you corrected the person or told the person doing it make sure you say the name louder. I can't say that I remember everything that the juror said but I do remember her being in the room and she was able to articulate answers to your questions. There was nothing unusual about her. She is not the only person who has communicated with court personnel. Juror Number 11 mentioned something to Mr. Joe about needing to leave early or not wanting to deliberate past Wednesday and we decided we weren't going to follow up on that. Jurors do that because they get familiar with the CSO-s [sic].

THE COURT: That was during a period of time when they weren't in deliberations and where they were free to discuss with the deputy who comes in, who makes coffee for them, someone who takes care of them but it is most highly unusual I think for a juror to step out of the deliberations room and to talk to the CSO.

MR. SHAPIRO: If I could just, the last point.

THE COURT: Go ahead, I'm sorry.

MR. SHAPIRO: In watching her in the courtroom during the polling of the jury she said firmly that was not her verdict and what that indicated to me was that she had felt pressured into a verdict -- a different verdict. There wasn't anything inappropriate in what

she said. What she said [4639] was that's not my verdict and so she was impeaching the verdict in that way and for whatever reason, had gone along with it back in the jury room. So I—

THE COURT: You don't think that's odd to have gone along with it in the jury room?

MR. SHAPIRO: Not odd if you've been pressured into something where people are saying I want to get out of here and you've got to—I'm not suggesting the other jurors did that, I don't know how it happened. It is not when—it is not if you're a sole holdout juror and you feel like you've been pressured into something. I don't think—

THE COURT: But this juror, as I said—this jury knows how to tell us that they're deadlocked. So, in light of that—

MR. KLUGMAN: I think, if I may, Mr. Shapiro, I think there's two separate issues. Again, we need to be cautious not to make assumptions from things that are not in the record about what is actually going through this juror's mental process but the reason—I mean this is a different issue from what Mr. Shapiro has just raised, I mean each side is entitled to a jury of 12 competent jurors and I think—

THE COURT: Correct.

MR. KLUGMAN:—that based on the record of this woman's health issues and some of the other things that are quite unusual to me in my limited experience but I don't [4640] think, you know, jurors rushing out of the room during deliberations, you know, about going to get—needing to get medication an hour and a half away or an hour and a half later is something that certainly raises an issue about the health of this juror.

So, I think the Court's suggestion is an appropriate one and I think the government agrees with the Court that it is appropriate to ask this woman questions about her health, not about her deliberations, not about what's going on with that to find out if she's competent to deliberate in the first place.

MR. SHAPIRO: Your Honor, I hadn't quite finished, so just to finish on the points that you had raised, her medical condition was a broken kneecap, it wasn't an emotional, psychological medical condition.

THE COURT: No, it may well be that this is a physical condition but that is requiring her to take medication. I don't know that it is a mental condition or a physical condition. She has some problem I think, some medical problem that required her to be in such distress that she came out of the jury room yesterday to say that she had to get home by seven. It was only about 20 after five and they are routinely, you know, they're kept between five and 5:30, so.

MR. SHAPIRO: But—

[4641] THE COURT: I don't know what the distress is exactly.

MR. SHAPIRO: We've had other days where the jurors have said they have appointments and wanted to leave.

THE COURT: Correct, but instead of getting a note of that kind, this juror left the jury room.

MR. SHAPIRO: It was at the end of after four days of intense deliberations.

MR. KLUGMAN: Again, we're making assumptions, we don't know what went on in that room. What we do know is that these appointments that Mr. Shapiro talked about that these other jurors had are, you know, I have a child care issue or I have to be back at

work or, you know, Juror Three who was excused, I'm not going to get paid anymore. That's completely different from, you know, I don't know if I want to call them hot flashes but basically several times during the trial requiring a recess, one of which I know at least she said she had migraines or at least it was reported by somebody that she had a migraine and now this medication issue. I mean if she's taking medication, who knows if her mind is even clear to participate in deliberations. I mean these are the things that I think both sides are entitled to find out and so, as I said, we agree with the Court's recommendation.

MR. SHAPIRO: My recollection is that during the trial there was one day—there were some days that the [4642] courtroom was very warm, I know I felt it, and there was one day when Juror Number Ten wanted to take a quick break for water and you took the break.

THE COURT: Well, the time we took a break is when the juror sitting in front of her said the juror is fainting and that's why we stopped, it wasn't just a quick break for water, and we actually—I don't know if she went to the nurse but we offered her the nurse. I believe we gave her some medication, Tylenol or something.

MR. KLUGMAN: And another juror flagged me during the trial, I thought it was because she couldn't see an exhibit on the screen, it turned out because this woman behind her was having some issue which I didn't realize until after they went out and came back.

MR. SHAPIRO: To conclude, Your Honor, I think that if you ask her questions about her medical—if she has some sort of medical problem, then, again, it highlights to her that there's something wrong with her in her deliberations. If she feels that she can't delibe-

rate because of a medical problem, she can do that, she can tell us that, she can do it by a note or she can do it by saying something to the CSO and she hasn't said that and I'm afraid if you do that and single her out, she is being sent a message that she's failed in her duty as a juror.

MR. KLUGMAN: I disagree with that. I think, as I [4643] said before, each side is entitled to a jury of 12 competent people who have the capacity to deliberate and at this point with this record I think we have a basis for asking these questions.

Now, whether the Court chooses to do it with counsel sitting there or the Court chooses to ask the questions without us sitting there and then read back the record similar to the way we did it with—I don't remember which juror it was, I guess it was Mr. Keres (ph) who has been excused, either of those options is fine but I think the Court is correct, there is an issue about her competency and an inquiry into her health is appropriate.

If Mr. Shapiro would prefer, if he thinks it would be less coercive for the Court to do it just with the reporter, Your Honor and whatever court personnel the Court wants there, that's fine with the government. If Mr. Shapiro thinks we all should be there, that's fine with the government as well.

MR. SHAPIRO: I would want to be present, Your Honor. I think that your original idea—

THE COURT: That's fine. I take it the defendant doesn't have to be there?

MR. SHAPIRO: I don't think—I will talk to him but I don't think he would feel like he had to be there.

THE COURT: Okay.

[4644] MR. SHAPIRO: But I do—if you're going to do it, I want to be there. Understand I do object to it.

THE COURT: That's fine. All right. Let me just try to formulate how I would do this and then the next question would be whether we ought to wait a bit, give the *Allen* charge some opportunity to work but in the meantime I need to try to write up what exactly I would say.

MR. KLUGMAN: Your Honor, why don't we wait—why don't we for the time being wait and I suppose if we don't get a note within a reasonable period of time, we can reconsider it. Obviously if we get a note similar to these, then we'll consider that note.

THE COURT: Okay. I'll sit here and try to write something up. * * *

THE COURT: Counsel.

Well, what is the number, Victor?

THE CLERK: It is number 17, Judge.

THE COURT: Counsel, you've been given copies of Court Exhibit 17, the latest note from the jury. * * *

[4652] * * * (Juror Number Ten enters the room.)

JUROR NO. 10: I'm sorry, Your Honor.

THE COURT: Don't say anything—

JUROR NO. 10: Okay.

THE COURT: —until I ask you questions.

JUROR NO. 10: Okay.

THE COURT: I don't want to be rude but it is very important because I absolutely do not want to know anything about what your views are of the merits of this case or the evidence, all right. So, I really have a

very limited number of questions that I have to ask you.

JUROR NO. 10: Okay.

THE COURT: So, I received a note just now—

JUROR NO. 10: Uh-huh.

THE COURT: —from the jury and it includes this sentence: "Returning to the jury room as per your latest instructions Juror Number Ten—that's you—revealed that she had spoken to an attorney last night to determine which of the charges were the most serious."

JUROR NO. 10: You want me to answer that, Your [4653] Honor?

THE COURT: Yes, I want to know if that's true.

JUROR NO. 10: Of course not, Your Honor. I said, listen, last night I have a huge question, I ask my sister who be a professor in Brazil what's the—she's here with me now, what is the difference between conspiracy and fraud and they said you consulted a lawyer. No, no, I didn't consult a lawyer. I have a huge issue to—

THE COURT: You have a?

JUROR NO. 10: I have a huge, you know, issue in my head, I don't know the meaning.

MR. SHAPIRO: Your Honor, I think we're getting into—

THE COURT: Yes, yes. I don't want to hear about what the issues are in your mind. I want to know who it is that you spoke to about the case.

JUROR NO. 10: It is—I didn't spoke about the case, Your Honor, I just ask a question.

THE COURT: What was the question?

JUROR NO. 10: What is the difference between conspiracy and fraud. It was just a question.

THE COURT: Okay. And who did ask you the question of?

JUROR NO. 10: My sister.

THE COURT: And who is your sister, I mean why did [4654] you ask your sister?

JUROR NO. 10: Because she is a professor in Brazil, I thought she could help me to define the two words better in my head.

THE COURT: What did you say about your head?

JUROR NO. 10: Better in my head. I'm from Brazil, I have an accent.

THE COURT: And your sister is a Brazilian but she's visiting you now, is that what you're saying?

JUROR NO. 10: Yes, ma'am.

THE COURT: What is she a professor of?

JUROR NO. 10: She's in Portuguese literature.

THE COURT: Portuguese literature?

JUROR NO. 10: Uh-huh.

THE COURT: Is she also an attorney?

JUROR NO. 10: No, ma'am.

THE COURT: Have you spoken to an attorney?

JUROR NO. 10: No, I don't know any attorneys.

THE COURT: Okay. And did your sister give you an answer?

JUROR NO. 10: She said, well, I don't know how I can help you with those questions, I believe this is two different words with two different meanings and that's it. That was just, you know, the answer.

THE COURT: You're saying your sister said they were [4655] two different words?

JUROR NO. 10: She said, yeah, I believe in English it is two different words and so in Portuguese.

THE COURT: Did you speak with anyone else about this case?

JUROR NO. 10: No, ma'am.

THE COURT: And you're saying she didn't give you any definitions of the words?

JUROR NO. 10: She said in Portuguese.

THE COURT: Well, translate it for me into English because I don't know Portuguese.

JUROR NO. 10: In English, I try my best, okay. Fraud, she said, no matter if—you know, a very vulgar example, a neighbor came to me – an example.

THE COURT: She gave you an example?

JUROR NO. 10: Yes. You know, just so I can be clear in my head. If a neighbor came to you and said I'm going next door and I intend to kill the neighbor's pet and I'm pretty sure she was serious when she says she's going to kill the pet and you know how much the neighbor like your dog and you didn't stop your neighbor to do so, this could be a fraud. You have an intention—you have—she has the intention—if she don't have the intention to kill but just to mention she will, this could be a fraud, considered fraud. I don't know, it is a little confused. I'm still a little [4656] confused there.

THE COURT: All right.

JUROR NO. 10: And the conspiracy, she said it could be more than two or three people together, to put a few groups of people together to conspire, you know, against someone.

THE COURT: Anything else that she—is there other information that she gave you?

JUROR NO. 10: No.

THE COURT: Did you share with the jurors the information that your sister gave you?

JUROR NO. 10: I told the jurors today this morning when I get here when we're now going to give to the judge—

THE COURT: No, no, I'm saying did you share the information that you received from your sister with the other jurors or did you simply tell them that you spoke to your sister?

JUROR NO. 10: I told the jury, listen, I have a doubt and I spoke. I didn't mention the trial—

THE COURT: Excuse me?

JUROR NO. 10: —to my sister.

THE COURT: I'm asking you whether or not you said anything about the substance of what your sister said to you to the other jurors?

JUROR NO. 10: No, ma'am.

THE COURT: No.

[4657] JUROR NO. 10: They started screaming with me, said I want you out of the jury. Whatever I was writing to the judge, explain I can't talk, nobody let me talk.

THE COURT: All right then, I'm going to ask that you stay here, you have some water, I'll ask that you stay here with the marshal and I'm going to go back into the courtroom with the lawyers and we'll discuss this some further, all right. So, just stay here with the marshal.

JUROR NO. 10: I want to say something.

THE COURT: No, please, I don't want to hear anything about the deliberations—

JUROR NO. 10: No, it was not deliberations.

THE COURT:—with the jurors.

JUROR NO. 10: It is not the deliberations.

THE COURT: I don't want to hear—well, tell me what the subject matter is before I hear anything about it.

JUROR NO. 10: I think we have such, you know, a huge issue now, I'm so uncomfortable inside now.

THE COURT: Okay. All right. We're going to step out and I'll come back in a while to tell you what we're going to do.

JUROR NO. 10: Okay, thanks.

(End of proceedings in the robing room.)

(Continued on next page.)

[4658] (The following takes place in the courtroom.)

MR. SHAPIRO: Your Honor, I renew my request for a mistrial.

THE COURT: Denied.

MR. SHAPIRO: Note 17—

THE COURT: Denied, so let's talk about this juror.

MR. SHAPIRO: Well, note 17 misstates what the juror actually did. It says that she spoke to an attorney when she in fact didn't. All the cases that talk about these kind of situations talk about the problem that arises when there is a group of jurors, 11 jurors or maybe less who are frustrated with one juror who disagrees with them and who says that they have a doubt, that's what this juror was saying, and out of frustration she talked to her sister. That would not be something that would be incurable in an instruction. If that had happened, if that had come up any time during the trial, you would simply say to the jury do not speak to anybody, you get the law from me, for example.

THE COURT: I've already done that multiple times and it is in writing, it is in my instructions if you need any clarification on the law, ask me. It couldn't be any clearer than that and it couldn't be any clearer day after day telling them that they're not allowed to speak to anyone.

[4660] * * * MR. SHAPIRO: But I think that you could—first of all, I think that is a curable problem. If they were going to go back and deliberate, and I don't think they can deliberate given the way—given how upset she was apparently with the other jurors, you could easily cure that by saying to her you must follow the law as I give it to you just like as if I stood up there and said something wrong in a closing argument, something incorrect about the law, you would say disregard what he said, I'm the person who gives you the law and that's what you have to follow. This did not happen until last night after four days of frustrating, you know, tense—

THE COURT: Does that make it okay that she then can reach out and ask somebody else? Are you saying that it is all right after four days of deliberation that a juror can seek outside advice?

MR. SHAPIRO: What I'm saying is that it is curable, given what the nature of it was, it is curable. There isn't anything so significant about what she did that has now changed her mind, she was the person who was arguing for an acquittal. * * *

[4662] * * * MR. SHAPIRO: Well, Mr. Klugman said she agreed with the verdict in the jury room, we don't know that. He's right, we don't know exactly what happened in the jury room. We know we got a

jury note saying there's a verdict and we know what—we got what the foreperson said then and we know she said in court that's not my verdict.

Now the issue is she talked to her sister who is a [4663] professor of Portuguese literature who came up with some examples. What I'm saying is you can say to her you must follow the law as I've instructed, you must disregard that.

You should not dismiss her. I think you should grant a mistrial because I think they are hopelessly deadlocked and I don't think you can dismiss her based on that late in the deliberation event, frankly, out of frustration with her fellow jurors. * * *

[4665] * * * THE COURT: Counsel, come up, please.

All right, counsel, anything else that you wanted to say?

MR. SHAPIRO: Yes, your Honor. We did, in the brief amount of time, do some research. We think that you can instruct the juror and the jurors that they are required to follow the law as you give it to them and to disregard anything that juror number 10 may have heard or that the other jurors may have heard, and we can give you some cites to cases that we found. * * *

[4667] * * * MR. SHAPIRO: And your Honor, I do again want to raise the point that I raised before, which is that the note itself from the other jurors misstated what the juror reported to you she had said to them.

And I think that is a very significant fact and it shows the kind of dispute or at loggerheads that the jurors are at that justifies granting a mistrial.

THE COURT: All right, counsel, accepting the proffers of what defense counsel has indicated is in the cases that they have cited to me, I nonetheless feel that in this case the juror's misconduct is not curable and I'm going to excuse juror number 10.

This juror has freely admitted to actions amounting to extremely serious misconduct by a juror, violating fundamental principles that, as I explained to the jury from [4668] the beginning, are necessary to preserve the sanctity of the trial process. These are principles which I repeated almost every day of this seven week trial.

Based on my observations, including the demeanor of the juror and the content of her answers, I'm satisfied that that juror cannot be rehabilitated by simply telling her once again not to speak to anyone outside of the jury room.

So I'm going to ask, Victor, that you ask the juror to be brought into the courtroom. I will excuse her and I will once again tell her not to discuss the case. But I can't have confidence that this juror will follow that instruction but hopefully, she will at least not discuss the case with any of the deliberating jurors and I have confidence in the other jurors that if she approached them, that they will not discuss it with her.

So bring in the juror, please.

MR. KLUGMAN: The Court wants us up here or seated.

THE COURT: You can be seated.

(Pause.)

(Juror number 10 enters the courtroom.)

THE COURT: Ms. Daniels, I just wanted to tell you that I am going to be excusing you from jury service at this time and Victor will tell you what you need to do with respect to your service. It's important since the jury is going to continue working and the alternate that you not discuss the [4669] case most importantly with any of them or with anyone at all until this case is completed.

A JUROR: Yes, your Honor.

THE COURT: Thank you.

(Juror number 10 excused.)

THE COURT: All right, counsel, the next issue is that I'm authorized to either go with 11 jurors or to substitute an alternate.

I think that under the circumstances, the appropriate thing is to substitute alternate number 1 and direct them to begin their deliberations anew.

MR. SHAPIRO: I agree.

MR. KLUGMAN: Okay.

THE COURT: Thank you. Then, would you bring in the jurors.

THE CLERK: Alternates and jurors?

THE COURT: Yes, but don't seat them together.

THE CLERK: I understand.

(Pause.)

(Jury in at 4:20 p.m.)

(Alternates enter the courtroom.)

THE CLERK: Thank you. Please be seated.

[4670] THE COURT: Members of the jury, I have excused juror number 10 from jury service. I am instructing you not to speculate on why or discuss anything that she said during the deliberations. I'm going to be replacing juror number 10 with alternate number

1, Miss Galbey, and actually, you don't have to move your seat at this point but I just do need to give you some instructions about that.

The jurors must begin their deliberations anew. That means that you put aside all of your prior deliberations and you start afresh with the new configuration of 12 jurors.

So once again, I will ask you to begin your deliberations. * * *

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America,
Plaintiff,
v.
Bradley STINN,
Defendant.

Case Number CR 07-113 (NG)

Transcript of Proceedings for March 24, 2008

[4678] * * * MR. SHAPIRO: I wanted to get into writing all three of the points that I made on the arguments that I made to you last week.

With respect to going ahead with 11 jurors or going ahead with putting an alternate in. I was confronted with a choice that I didn't think I should even have to make [4679] because I thought there should be a mistrial.

So, if I have an in-court verdict from 11 or likely 11 jurors who have said that my client is guilty, I cannot very well represent him and say the Court ought to go ahead with 11 jurors. I don't think we should have gone ahead with 11 or 12 jurors after what happened with juror ten.

And then finally, having gone ahead, having had the process that we had, and having the alternate sit in Court and hearing everything that went on I think the alternates cannot be put into a jury, nobody could, being put into a jury in these circumstances, and be able

to be fair nor could the other 11. I ask you to reconsider all the evidence after what they have already gone through.

So, I think that that's another reason why there needs to be a mistrial, but there are no cases on this because it is a highly unusual situation. There are cases that have come up or did come up when the rule was different but they are; but they are from a time when judges couldn't use alternates after deliberations had gone on. But I think in the unique circumstances of this case where the alternates heard everything that was going on and saw what happened this alternate can simply cannot be fair to my client.

MR. KLUGMAN: Well, Mr. Shapiro now has had four days to contemplate what happened this week. He is objecting to putting an alternate in on Count Two and Count Three. If [4680] that's what he wants, let's take the verdict we had before. If he wants to withdraw the objection, we can allow them to continue on all three counts but he can't have it both ways. He can't, after four days of reflection, on the one hand say, I don't want alternate in there because they heard what happened even though the Government obviously disagrees with that position. But then, on the other hand, well, we can't go back to it. We could. We could go back to 11; 11 reached a verdict and maybe we should do that on Count Two and Count Three.

THE COURT: Anything else?

MR. SHAPIRO: No, Your Honor.

THE COURT: All right.

Addressing then the March 24, 2008, letter from defense counsel, again, requesting a mistrial in this case, the application is denied.

The record as to what occurred in this case speaks for itself and all I feel I need to do at this time is just note that I do not agree with the characterizations of that record that are set forth in defense counsel's letter.

So, counsel, we can wait until we hear from the jury; all the jurors are here. Let me just Victor ask if we have ordered lunch for them. * * *

[4685] * * * THE COURT: And alternates. I have your note which reads, "Court Exhibit 19," and dated 3/24/08 and it reads, "Your Honor, we, the jurors, have come to a verdict."

Is the verdict unanimous.

THE FOREPERSON: Yes.

THE JURY: (Collectively) Yes.

THE COURT: May I see the verdict sheet, please.

(Handing to the Court.)

COURTROOM DEPUTY: The verdict sheet is now being handed up to the Court.

THE COURT: The verdict sheet is in order and it will be returned to the foreperson.

Ms. Spencer-Phillip, I will ask you to answer the following questions:

How do you find the defendant on Count One?

THE FOREPERSON: Guilty.

THE COURT: And do you find venue for Count One?

THE FOREPERSON: Yes, Your Honor.

THE COURT: How do you find the defendant on Count Two?

THE FOREPERSON: Guilty.

THE COURT: Do you find venue for Count Two?

THE FOREPERSON: Yes, Your Honor.

THE COURT: And, how do you find the defendant on Count Three?

[4686] THE FOREPERSON: Guilty.

THE COURT: And, do you find venue for Count Three?

THE FOREPERSON: Yes, Your Honor. * * *

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America,
Plaintiff,
v.
Bradley STINN,
Defendant.

Case Number CR 07-113 (NG)

Trial Exhibit for March 13, 2008

EX. 7, JURY NOTE TO JUDGE GERSHON

DATE: 3-13-08

NOTE: Your Honor,

We will be finishing our work today at 5 PM. We are making good progress and plan to continue tomorrow at 10:00 AM.

/s/ Marlene Spencer Phillip
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America,
Plaintiff,
v.
Bradley STINN,
Defendant.

Case Number CR 07-113 (NG)

Trial Exhibit for March 17, 2008

EX. 10, JURY NOTE TO JUDGE GERSHON

DATE: 3-17-08 4 PM

NOTE: Your Honor,

One juror is unwilling to deliberate the case. (S)he made up his/her mind prior to deliberations this morning and announced that (s)he could not change her/his opinion. We have tried to discuss the evidence and testimony. We are at a standstill and need your guidance.

/s/ Marlene Spencer Phillip
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America,
Plaintiff,
v.
Bradley STINN,
Defendant.

Case Number CR 07-113 (NG)

Trial Exhibit for March 18, 2008

EX. 11, JURY NOTE TO JUDGE GERSHON

DATE: 3-18-08

NOTE: Your Honor,

We need to return to deliberations tomorrow. We still have the same problem as yesterday. One juror refuses to consider evidence or other jurors' opinions. We thought we reached a consensus on two counts (we had a written vote) hover [sic] the same juror changed the vote later in the day with no explanation.

/s/ Marlene Spencer Phillip
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America,
Plaintiff,
v.
Bradley STINN,
Defendant.

Case Number CR 07-113 (NG)

Trial Exhibit for March 19, 2008

EX. 13, JURY NOTE TO JUDGE GERSHON

DATE: 3-19-08 3:55 PM

NOTE: YOUR HONOR,

WE ARE UNANIMOUS IN OUR VERDICT ON TWO COUNTS. WE ARE DEADLOCKED ON ONE COUNT. WE NEED YOUR GUIDANCE.

/s/ Marlene Spencer Phillip
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America,
Plaintiff,
v.
Bradley STINN,
Defendant.

Case Number CR 07-113 (NG)

Trial Exhibit for March 20, 2008

EX. 14, JURY NOTE TO JUDGE GERSHON

DATE: 3-20-08

NOTE: Your Honor

We are submitting our unanimous verdict on two counts. We still need further instructions on one count. The foreperson would like to speak to the judge in chambers. ~~One juror~~

/s/ Marlene Spencer Phillip
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America,
Plaintiff,
v.
Bradley STINN,
Defendant.

Case Number CR 07-113 (NG)

Trial Exhibit for March 20, 2008

EX. 16, JURY NOTE TO JUDGE GERSHON

DATE: 3-20-08

NOTE: Your Honor

We cannot continue deliberations since one juror agreed to the verdicts rendered and then recanted when in the courtroom. She refuses to engage in deliberations. Her integrity is questionable and we have acted in good faith. The foreperson must speak to the judge.

/s/ Marlene Spencer Phillip
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America,
Plaintiff,
v.
Bradley STINN,
Defendant.

Case Number CR 07-113 (NG)

Trial Exhibit for March 20, 2008

EX. 17, JURY NOTE TO JUDGE GERSHON

DATE: 3-20-08

NOTE: Your Honor

Last night, this jury had come to a unanimous verdict on counts 2 & 3. As you know Juror #10 reversed her decision upon polling. Returning to the jury room as per your latest instructions, Juror #10 revealed that she had spoken to an attorney last night to determine which of the charges were the most serious. The rest of the jury feels any further deliberations are futile. We tried this in good faith, but this faith has been compromised. Please help us resolve this issue.

/s/ Marlene Spencer Phillip
FOREPERSON

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America,
Plaintiff,
v.
Bradley STINN,
Defendant.

Case Number CR 07-113 (NG)

The Government's Memorandum Of Law In Opposition To The Defendant's Motion For Release Pending Appeal

Jan. 19, 2009

[27] * * * The defendant next asserts that he will prevail on appeal pursuant to the Ninth Circuit's decision in *United States* v. *Williams*, 547 F.3d 1187 (9th Cir. 2008), which held that the giving of an *Allen* charge is *per se* reversible error where the judge knows the identity of the holdout jurors and the holdouts are aware that he knows their identity. The holding in *Williams*, however, is directly contrary to the Second Circuit's *en banc* decision in *Robinson*, in which the Court held that the *Allen* charge given in that case at a time when the Court knew the identity of the lone holdout, who had contacted the Court by letter, was not coercive. 560 F.2d at 516-18; *accord Ruggiero*, 928 F.2d at 1293-1300; *Crispo*, 306 F.3d at 76-77. Accordingly, even if the defendant can establish that the Ninth Circuit would not

have permitted the giving of an *Allen* charge pursuant to *Williams*, he will not prevail on appeal because *Williams* is contrary to the law in the Second Circuit. * * *

APPENDIX G

A. *United States* v. *Williams*, 547 F.3d 1187, 1203 (9th Cir. 2008)

I want all of you to discuss the case with your fellow jurors to reach an agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous. Each of you must decide the case for yourself, but you should do so after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should, but do not come to a decision simply because the other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but only if each of you can do so after having made your own conscientious decision.

Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

I want all of you to treat each other respectfully. I want all of you to listen to the views of your fellow jurors. And I want you to consider all of the instructions that I've given to you in addition to this one.

I've singled this one out right now because I wanted to remind you of it, but all the jury instructions are equally important. And so I want you to go back in that jury room. I want you to treat each other with respect. I want each of you to talk about your views about the evidence in the case, and then we'll see what happens from there. So you are all excused to go back into the jury room.

B. *United States v. Stinn*, Trial Proceedings on March 20, 2008

Members of the jury, for the time being I want to give you this additional instruction.

First, I need to tell you how grateful I am to you for all the work that you are putting into the case, many weeks of trial and now the deliberations. I understand and I want you to understand that it is not uncommon how much strain it is on each person to be here for a long period of time, to struggle together during deliberations. Each of you has worked very hard and I can see that and I have a great deal of respect for the amount of work and time and effort that each of you is putting into this.

This case, as I think is obvious, is important both to the government and to the defendant and it is s [sic] desirable that a verdict be reached. As I've also just said now, it is such hard work to deliberate and I understand that. It is, I assure you, it is normal and it is common for jurors to have differences and for there to be strains during deliberations. Frequently, however, we find that after extended discussions jurors may well reach agreement. Of course, this process of deliberations requires that each and every juror fulfill his or her sworn duty to deliberate and to discuss the case respectfully with each other, as I instructed you from the beginning.

When the jurors enter the jury room, it is their sworn duty to consult with one another and to consider each other's views and to discuss the evidence. I want to emphasize, of course, that although each of you has the duty to deliberate, that is to exchange views, no juror should ever vote for any verdict unless after full

discussion of the evidence that you heard and the legal instructions that I gave you it does represent his or her considered judgment in the case. I remind you to consider all of my instructions as a whole and that the government bears the burden of proof beyond a reasonable doubt as to each element of each crime charged.

So, thank you very much and I'm going to ask you to return to your deliberations.

APPENDIX H

U.S. Constitution: Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution: Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Supreme Court, U.S.
FILED
NOV 5 - 2010
OFFICE OF THE CLERK

No. 10-554

In the Supreme Court of the United States

BRADLEY J. STINN, PETITIONER,

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Discussion 1

I. The Dissent In *Wong v. Smith* Recognizes The Critical Need For This Court's Guidance Regarding The Constitutional Proscription Against Coercive Jury Instructions 3

II. The Court's Denial Of Certiorari In *Wong* v. *Smith* Leaves In Place The Established Circuit Split On The *Allen* Charge Issue Raised In Stinn's Petition For Certiorari 4

III. In This Case, Unlike *Wong* v. *Smith*, The Court Can Resolve The Constitutional Questions Directly, Without The Complications Of Review Under AEDPA 5

Conclusion 6

TABLE OF AUTHORITIES

CASES PAGE(S)

Allen v. *United States*, 164 U.S. 492 (1896) 2

Lowenfield v. *Phelps*, 484 U. S. 231 (1988) 3, 4, 5

Robert K. Wong, Warden v. *Anthony Bernard Smith, Jr.*, No. 09–1031 (Nov. 1, 2010) 1, 2, 3, 4, 5

Smith v. *Curry*, 580 F.3d 1071 (9th Cir. 2009) 4

United States v. *Sae-Chua*, 725 F.2d 530 (9th Cir. 1984) 4

United States v. *Williams*, 547 F.3d 1187 (9th Cir. 2008) 4

OTHER AUTHORITIES

Herrera v. *Oregon, petition for cert. filed* (U.S. Sept. 9, 2010) (No. 10-344) 1

SUPPLEMENTAL BRIEF

The dissent by three Justices from denial of certiorari in *Robert K. Wong, Warden* v. *Anthony Bernard Smith, Jr.*, No. 09–1031 (Nov. 1, 2010) ("*Wong* v. *Smith*") (Alito, J., dissenting from the denial of certiorari) highlights the need for this Court's review of the issues presented in the instant case. Because the dissent constitutes "intervening matter not available at the time of the party's last filing," petitioner Bradley Stinn respectfully submits this supplemental brief pursuant to Rule 15.8 to discuss the relevance of *Wong* v. *Smith* to the present petition for a writ of certiorari.

DISCUSSION

Stinn filed his petition for a writ of certiorari on October 22, 2010. On November 1, the government waived its right to respond to the petition, notwithstanding its previous acknowledgements that the courts of appeals are divided on each of the issues presented in Stinn's petition. See Pet. 10-11.[1] On the same day as the government's waiver, Justice Alito, joined by the Chief Justice and Justice Scalia, dissented from the denial of certiorari in *Wong* v. *Smith*, asserting that the issue in that case, which is likewise presented by the petition in the instant case, is one that requires further guidance from this Court.

---

[1] On November 2, 2010, the Court requested a response from the State of Oregon to the petition for writ of certiorari in another case presenting issues related to the Sixth Amendment's jury unanimity guarantee. *Herrera* v. *Oregon, petition for cert. filed* (U.S. Sept. 9, 2010) (No. 10-344).

Wong v. *Smith* reached this Court in a federal collateral attack on a state court trial. During deliberations in that trial, a juror sent the judge a note saying he was unable to convict because he thought the government's DNA evidence was unreliable. After receiving the note, the trial judge gave the jury a modified *Allen* charge, and also selectively commented on the evidence. See *Allen* v. *United States*, 164 U.S. 492 (1896). A short time after the trial court delivered its instruction, the jury returned a unanimous guilty verdict.

After exhausting his appeals in the California state courts, the defendant sought habeas relief in federal court, arguing that the trial judge had unconstitutionally coerced the jury's verdict. The district court, reviewing the state appeals court's decision under the standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. 2254(d), granted habeas relief, concluding that the trial judge's actions improperly coerced the jury, and that the state courts' holdings to the contrary unreasonably applied this Court's "clearly established" law. The Ninth Circuit affirmed. This Court denied the petition for writ of certiorari on November 1, 2010.

Justice Alito's dissent from the denial of certiorari recognized the critical need for guidance by this Court regarding the constitutional rule against coercive jury instructions, which is precisely the issue the instant petition presents. The denial of certiorari in *Wong* v. *Smith* leaves undisturbed Ninth Circuit law holding not only that an instruction in the circumstances of this case is coercive, but that the coercive nature of the instruction is "clearly established" within the meaning of Section 2254(d)(1), further evidencing the division in

the circuits on the question presented in the instant petition. Unlike *Wong* v. *Smith*, however, the instant case provides the Court with an opportunity to consider and address the constitutional questions presented here directly, without the overlay of AEDPA's requirement that the constitutional rule be "clearly established."

I. THE DISSENT IN *WONG* V. *SMITH* RECOGNIZES THE CRITICAL NEED FOR THIS COURT'S GUIDANCE REGARDING THE CONSTITUTIONAL PROSCRIPTION AGAINST COERCIVE JURY INSTRUCTIONS

Justice Alito's dissent recognized that "*[j]ust one* of this Court's decisions, *Lowenfield* v. *Phelps*, 484 U. S. 231 (1988), has addressed the constitutional rule against coercive jury instructions." *Wong* v. *Smith*, No. 09–1031, slip op. 3 (Alito, J., dissenting from denial of certiorari) (emphasis added). Accordingly, "clearly established law" is "sparse" with regard to demarcating the constitutional boundary between permissible instruction and proscribed coercion of a jury. *Ibid.* Because *Lowenfield* "held only that, on the totality of the circumstances present there, no unconstitutional coercion resulted," the "law in this area provides very little specific guidance." *Id.* at 3-4.

The Court acknowledged in *Lowenfield* that "*other combinations* of supplemental charges and polling" different than the particular circumstances presented in *Lowenfield* might transgress the constitutional boundary between instruction and coercion, 484 U.S. at 241 (emphasis added). In the twenty-two years since that decision, however, the Court has not offered further guidance regarding which circumstances cross the line into the constitutionally impermissible. In the meantime, the circuit split between the Ninth Circuit, which

deems the *Allen* charge given in this case coercive *per se*, and the Second Circuit, which equates the instruction's textual neutrality with a lack of coercion, has both deepened and widened into a broader disagreement among the courts of appeals and state courts of last resort. The Court should grant the petition for certiorari to provide "specific guidance" with regard to this significant and recurring issue. *Wong* v. *Smith*, No. 09–1031, slip op. 3-4 (Alito, J., dissenting from denial of certiorari).

II. THE COURT'S DENIAL OF CERTIORARI IN *WONG* V. *SMITH* LEAVES IN PLACE THE ESTABLISHED CIRCUIT SPLIT ON THE *ALLEN* CHARGE ISSUE RAISED IN STINN'S PETITION FOR CERTIORARI

In *Wong* v. *Smith*, the Ninth Circuit interpreted the principles set forth by the Court in *Lowenfield* as "clearly established" law warranting habeas relief in favor of the defendant. In doing so, the Ninth Circuit emphasized that the trial judge "knew not only the division of the jury but also the precise reasons the holdout juror, in his note, said he 'in good conscience [could] not vote for conviction,'" meaning that the judge's comments could reasonably be construed as "directed to the known concern of the holdout juror." *Smith* v. *Curry*, 580 F.3d 1071, 1082, 1084 (2009).

The denial of certiorari in *Wong* v. *Smith* leaves in place the Ninth Circuit's long-standing precedent recognizing that the *context* in which an instruction is given to a divided jury can make clear that it is directed at a holdout juror, thus rendering it impermissibly coercive. See, *e.g.*, *United States* v. *Williams*, 547 F.3d 1187 (2008); *United States* v. *Sae-Chua*, 725 F.2d 530 (1984). That interpretation of *Lowenfield* stands in

marked conflict with that of the Second Circuit, which as the government recognized below, rejects the Ninth Circuit's contextual analysis of *Allen* charges and instead focuses only on the language of the instruction in isolation. See Pet. App. 45a-46a.

III. In This Case, Unlike *Wong* v. *Smith*, The Court Can Resolve The Constitutional Questions Directly, Without The Complications Of Review Under AEDPA

Because *Wong* v. *Smith* involved a collateral habeas corpus attack on a state court judgment, it implicated the highly deferential AEDPA standard of review. See *Wong* v. *Smith*, No. 09–1031, slip op. 3 (Alito, J., dissenting from denial of certiorari) (under AEDPA, a state court decision will not be reversed unless it "involves not just an erroneous or incorrect decision, but an objectively unreasonable one"). By contrast, the instant petition for certiorari arrives at this Court on a direct appeal arising from a federal district court judgment. Thus, the Court can address the constitutional questions presented both in *Wong* v. *Smith*, and the instant petition, without the intervening overlay of AEDPA.

The instant petition presents a combination of holdout-targeting acts by the trial judge and jury majority whose coercive impact, when properly evaluated "in its context and under all the circumstances," *Lowenfield*, 484 U.S. at 237, plainly exceeds the coercion created by the trial judge in *Wong* v. *Smith*. In *Wong* v. *Smith*, after a holdout juror was identified, the trial judge gave the jury a modified *Allen* charge and commented on evidence tending to support a guilty verdict. Here, the trial judge not only delivered an *Allen* charge after the

identity of the holdout juror was divulged, the judge proceeded to remove the holdout juror from the jury, ostensibly for reasons unrelated to the juror's holdout status. Prompted by the jury majority's demonstrably false accusation against the holdout juror following the *Allen* charge, the trial court summarily dismissed the lone juror who had expressed "a doubt" about the government's case. Pet. App. 27a. The trial court's unconstitutionally coercive actions directly illuminate the unresolved circuit split that this Court should address by granting the petition.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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No. 10-554

In the Supreme Court of the United States

BRADLEY J. STINN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE PETITION ... 3

I. The Court Should Grant *Certiorari* Because The Removal Of A Lone Holdout Juror Under The Circumstances Here Violated Article III And The Sixth Amendment And Undermines The Framers' Original Intent That The Right To Trial By Jury Would Act As A Bulwark Against Government Overreaching 3

A. The Framers Understood That The Right To Trial By Jury Encompassed A Unanimity Requirement That Would Serve As A Powerful Check Against Oppression By The Government And The Majority 3

B. This Court Has Steadfastly Guarded The Jury's Central Role In The Criminal Justice System By Repeatedly Striking Down Practices That Are Inconsistent With The Original Understanding Of Article III And The Sixth Amendment .. 8

II. This Court Should Grant *Certiorari* Because Permitting An *Allen* Charge Where The Lone Holdout Juror's Identity Has Been

Divulged And Later Removing That Juror Would Strip Unanimous Verdicts Of Their Legitimacy And Exacerbate The Suppression Of Minority Viewpoints In Jury Deliberations 11

A. A Unanimous Verdict Decided By A Jury That Is Representative Of The Community Promotes Social Cohesion And Confidence In The Legal System . 11

B. Permitting Judges To Issue An *Allen* Charge Where The Lone Holdout Juror's Identity Is Known Magnifies The Already Significant Psychological Pressure That Lone Holdouts Face To Accede To The Majority Viewpoint 18

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Apodaca v. Oregon,
406 U.S. 404 (1972) 3, 4, 6, 8, 9

Apprendi v. New Jersey,
530 U.S. 466 (2000) 10

Batson v. Kentucky,
476 U.S. 79 (1986) 17

Blakely v. Washington,
542 U.S. 296 (2004) 4, 10

Duncan v. Louisiana,
391 U.S. 145 (1968) 3, 5

Glasser v. United States,
315 U.S. 60 (1942) 17

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994) 17

Love v. Yates,
586 F. Supp. 2d 1155 (N.D. Cal. 2008) 20

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010) 9

Peters v. Kiff,
407 U.S. 493 (1972) 17

Powers v. Ohio,
499 U.S. 400 (1991) 11

Quercia v. United States,
289 U.S. 466 (1933) 21

Robinson v. Gibson,
35 F. App'x 715 (10th Cir. 2002) 20

Smith v. Texas,
311 U.S. 128 (1940) 11

Taylor v. Louisiana,
419 U.S. 522 (1975) 11, 12

United States v. Booker,
543 U.S. 220 (2004) 10

United States v. Symington,
195 F.3d 1080 (9th Cir. 1999) 20

United States v. Thomas,
116 F.3d 606 (2d Cir. 1997) 18

Constitutional Provisions

U.S. CONST. amend. VI 3, 5, 8

U.S. CONST. amend. XIV 8, 9

U.S. CONST. art. I, § 9, cl. 3 5

U.S. CONST. art. III 3, 5, 6

U.S. CONST. art. III, § 2, cl. 3 5

Other Authorities

JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES (1797) .. 6

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David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview*, 83 CORNELL L. REV. 1638 (1998) 17

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1768) 4

William Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Juror's Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001) 14, 17

Danielle Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203 (2005) 20, 21

Shari Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006) 13

Leslie Ellis & Shari Seidman Diamond, *Race, Diversity and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.–KENT L. REV. 1033 (2003) 13

John Gastil, et al., *Do Juries Deliberate? A Study of Deliberation, Individual Difference, and Group Member Satisfaction at a Municipal Courthouse*, 38 SMALL GROUP RES. 337 (2007) 16

ALEXANDER HAMILTON & JOHN JAY, THE FEDERALIST NO. 83 (1788) 5, 7

REID HASTIE, ET AL., INSIDE THE JURY (1983) 13

Herrera v. State of Oregon, No. 10-344, Pet'r's Br. for Writ of Certiorari 9

James A. Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 LAW & HUM. BEHAV. 83 (1985) 14

Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) . . . 16

Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993) 14, 15

Bibb Latané & Sharon Wolf, *The Social Impact of Majorities and Minorities*, 88 PSYCHOL. REV. 438 (1981) 19

Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 76 YALE L.J. 593 (1987) 15

Nancy S. Marder, *Juries, Justice and Multiculturalism*, 75 S. CAL. L. REV. 659 (2002) 12

Charlan Nemeth, *Interactions Between Jurors as a Function of Majority v. Unanimity Decision Rules*, *in* IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM (Lawrence S. Wrightsman et al., eds., 1987) 9

Note, *Deadlocked Juries and the* Allen *Charge*, 37 ME. L. REV. 167, 173 (1985) 20

Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968) 19

Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569 (2007) 18, 19, 20, 21

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Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury*

Deliberations, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006) 15, 16, 20

LYSANDER SPOONER, TRIAL BY JURY 206 (1852) . 7, 8

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Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000) 14, 15

Joshua Wilkenfeld, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 COLUM. L. REV. 2291 (2004) 13, 16

JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON (1804) 7, 8

INTEREST OF *AMICUS CURIAE*

Amicus curiae the Center on the Administration of Criminal Law ("the Center") respectfully submits this brief in support of Petitioner Bradley J. Stinn.[1] The Center, based at the New York University School of Law, is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and participation in the formulation of public policy. In general, the Center's litigation practice encompasses cases in which the exercise of prosecutorial or judicial discretion raises significant substantive legal issues. A primary guiding principle in selecting cases to litigate is to identify those in which discretion may be exercised to engage in overaggressive or unwarranted interpretations of the Constitution, statutes, regulations, or policies in a way that diverges from standard practices or raises fundamental questions of defendants' and citizens' rights. The Center also defends the exercise of prosecutorial and judicial discretion where those discretionary decisions comport with applicable law and standard practices and are consistent with law enforcement priorities.

The Center's appearance as *amicus curiae* here is prompted by its concern that allowing courts to remove

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

holdout jurors without clear and convincing evidence of a compelling and neutral reason for doing so will undermine the meaning and purpose of the constitutional right to trial by jury. Thus, this case is an important one to the Center's mission.

SUMMARY OF ARGUMENT

It is vitally important for this Court to safeguard the constitutional role of the criminal jury and to ensure that a jury's verdict represents the unanimous decision of a fair cross-section of the community. Where, as in this case, a judge issues an *Allen* charge after the identity of a lone holdout juror has been revealed – and then subsequently removes that juror where the context suggests that her removal was based, at least in part, on her position during deliberations – the result invites questions about the legitimacy of both the jury process and the ultimate verdict. Those questions take on an added significance where, as here, the lone holdout identifies with a segment of the community that has historically been excluded from jury participation. In short, practices that have the effect of limiting full and fair participation in jury deliberations are no less pernicious under the Constitution than practices that systematically exclude certain groups from participating in the first instance. The petition for a writ of *certiorari* should be granted.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant *Certiorari* Because The Removal Of A Lone Holdout Juror Under The Circumstances Here Violated Article III And The Sixth Amendment And Undermines The Framers' Original Intent That The Right To Trial By Jury Would Act As A Bulwark Against Government Overreaching

The constitutional right to trial by jury in criminal cases is "fundamental to our system of justice" and "is granted to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 153, 155 (1968). In order to secure this core right, this Court has recognized that, at least in federal cases, the Constitution guarantees defendants a *unanimous* verdict. The unanimity requirement is essential to the jury fulfilling its responsibility as a check on government overreaching. The removal of a lone holdout juror under the circumstances presented here undermines the unanimity requirement and erodes the fundamental protections guaranteed by Article III and the Sixth Amendment.

A. The Framers Understood That The Right To Trial By Jury Encompassed A Unanimity Requirement That Would Serve As A Powerful Check Against Oppression By The Government And The Majority

Dating back to the mid-14th century, the unanimous jury verdict "had become an accepted feature of the [colonial] common-law jury" by the time of the 18th century, and was regarded as a bulwark against the abuse of royal power. *Apodaca v. Oregon*,

406 U.S. 404, 408 (1972); *id.* at 369 (Powell, J., concurring in judgment) ("In an unbroken line of cases reaching back into the late 1800s, . . . this Court [has] recognized, virtually without dissent, that unanimity is an indispensable feature of federal jury trial."). Sir William Blackstone praised trial by jury as "the glory of the English law," describing "it [a]s the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the *unanimous* consent of his neighbors and equals." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (1768) (emphasis added); *accord Blakely v. Washington*, 542 U.S. 296, 301 (2004) (affirming the "longstanding tenet[] of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours'") (quoting 4 BLACKSTONE, COMMENTARIES 349-50).

Wielded as a defense against abuses of imperial power, juries played a critical role before the Revolution in resisting royal authority. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994).[2] The British Crown's subsequent efforts to minimize the role of colonial juries only galvanized the colonists; its efforts to deprive them of trial by jury would become a key grievance in the Declaration of Independence. *Id.* at 873-76.

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[2] Indeed, four colonial constitutions expressly required unanimity, and others provided for trial by jury in accordance with common law. *Apodaca*, 404 U.S. at 409 n.3.

In framing the Constitution, the Founders were steadfast in their support of juries as an institution, guaranteeing the right to trial by jury in criminal cases not once, but twice – in both Article III and the Sixth Amendment.[3] U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI. As Alexander Hamilton noted, "the friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury." 2 ALEXANDER HAMILTON & JOHN JAY, THE FEDERALIST NO. 83, at 331 (1788).

Given their experience under British rule, "[t]hose who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority." *Duncan*, 391 U.S. at 156. Justice Joseph Story remarked, "The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of the rulers, and against a spirit of violence and vindictiveness on the part of the people." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1774 (1833).

Although the Framers were slightly more optimistic about the willingness of appointed judges to resist Executive and majoritarian oppression, they also acknowledged that the protections of independence,

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[3] The Framers' particular concern with the federal government overreaching in criminal matters is reflected not only by the prominence that the right to trial by jury was given in the Constitution, but also the specific prohibitions against Bills of Attainder and Ex Post Facto laws. U.S. CONST. art. I, § 9, cl. 3.

lifetime tenure, and undiminishable salary were not entirely sufficient. "[M]ore than a permanent government official – even an independent Article III judge – was required to safeguard liberty," since judges "would be appointed by the central government, and might prove reluctant to rein in their former benefactors and current paymasters." Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1158 (1991). Likewise, Justice Story viewed "the severe control of courts [and] the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty" as "a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passion of the multitude, who may demand their victim with a clamorous precipitancy." STORY, *supra*, § 1774.

While the Framers did not explicitly provide for unanimous jury verdicts in the Constitution, their writings reflect a shared understanding that the right to trial by jury *meant* the right to a unanimous verdict. As John Adams wrote, "It is the unanimity of the jury that preserves the rights of mankind[.]" 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 376 (1797). James Madison's original draft of the Sixth Amendment included the phrase "with the requisite of unanimity for conviction." While some assert that its later removal "was intended to have some substantive effect," the more likely view is that this language was removed as surplusage, as the unanimity requirement was "thought already to be implicit in the very concept of the jury." *Apodaca*, 404 U.S. at 409-10.

The Framers also recognized that the tyranny of the majority – inherent in democracy – that they now faced differed somewhat from the royal tyranny they had known before. Nonetheless, they regarded the jury in criminal cases as an equally effective check against this form of potential oppression. As Hamilton observed, "it would be altogether superfluous to examine . . . how much more merit [the jury] may be entitled to as a defence against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty." THE FEDERALIST NO. 83, at 332. Lysander Spooner similarly noted, "[t]he will, or the pretended will, of the majority, is the last lurking place of tyranny at the present day," and the jury's ability to limit the power of the majority is "the crowning merit of the trial by jury." LYSANDER SPOONER, TRIAL BY JURY 206 (1852).

The unanimity requirement was considered vital to the jury's ability to serve as a powerful check on the majority: "the trial by jury says that no man's *rights* . . . shall be determined by any such standard as the mere will and pleasure of majorities; but only by the unanimous verdict of a tribunal fairly representing the whole people . . . ." *Id.* at 214. Justice Wilson similarly observed that "the evidence, upon which a citizen is condemned, should be such as would govern the judgment of the whole society: and we may require the unanimous suffrage of the deputed body who try, as the necessary and proper evidence of that judgment." 2 JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON 315 (1804). He added "That the sentiments of the majority shall govern, is,

as we have showed at large, the general rule of society. To this rule we have seen the strongest reason to introduce an exception, with regard to verdicts of conviction in criminal prosecutions." *Id.* at 352.

But juries can serve as an effective check against the government and the majority only if the unanimity requirement ensures that minority voices are heard. Removal of a lone holdout juror by a federal judge without clear and convincing evidence that the juror is incapable of performing her duties threatens to undermine the guarantee that "[t]he jury is a fair epitome of 'the country' at large, and not merely of the party or faction that sustain[s] . . . the government" and "that the classes, who are oppressed by the laws of the government . . . will have their representatives in the jury," as the Framers originally intended. SPOONER, *supra*, at 7.

B. This Court Has Steadfastly Guarded The Jury's Central Role In The Criminal Justice System By Repeatedly Striking Down Practices That Are Inconsistent With The Original Understanding Of Article III And The Sixth Amendment

While a plurality of this Court concluded in *Apodaca* that the Sixth Amendment's unanimity requirement was not incorporated against the States through the Due Process Clause of the Fourteenth Amendment, Justice Powell's controlling opinion nevertheless made clear "that unanimous verdicts are *essential* in federal jury trials." 406 U.S. at 366, 370 (emphasis added). Justice Powell reasoned that the unanimity requirement applied against the federal government (but not the States) "because [it] [wa]s

mandated by history," declining to rely on the broader argument that unanimity was "fundamental to the function performed by the jury." *Id.* at 370; *see also id.* at 379 (rejecting the "assumption that the members of the jury constituting the majority [will fail to] consider the minority's viewpoint in the course of deliberation" and "find[ing] nothing in Oregon's experience to justify the apprehension that juries not bound by the unanimity rule will be more likely to ignore their historic responsibilities").[4] Empirical studies conducted in the past four decades, however, call into question (if not outright reject) those assumptions regarding the jury's deliberative process that Justice Powell (and the plurality) relied on to support the notion that unanimity is somehow not fundamental to a jury trial. *See* Charlan Nemeth, *Interactions Between Jurors as a Function of Majority v. Unanimity Decision Rules*, *in* IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM 250 (Lawrence S. Wrightsman et al., eds., 1987) (finding that juries not bound by unanimity rule show marked tendency to "stop[] . . . deliberat[ing] when the required number [of votes are] reached").

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[4] Whether that incorporation analysis would apply today is in doubt. Because the right to trial by jury is incorporated against the states, all of the concomitant aspects of that right should be incorporated as well. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 (2010) ("[I]ncorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'") (plurality opinion, internal citation omitted); *id.* at 3058, 3064, 3068 (Thomas, J., concurring in judgment); *see also Herrera v. State of Oregon*, No. 10-344, Pet'r's Br. for Writ of Certiorari at 5-11.

In any event, the right to a unanimous verdict remains a bedrock constitutional right in federal criminal cases – and, therefore, any practice that infringes on that right, such as the removal of a properly empanelled juror, should be subject to strict scrutiny. In this context, that means there must be clear and convincing evidence of a compelling and neutral reason for removing a juror during deliberations. The fact that doing so might be viewed as inconvenient or inefficient is no argument to the contrary. *Cf. Blakely*, 542 U.S. at 326 ("Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.") (O'Connor, J., dissenting); *United States v. Booker*, 543 U.S. 220, 244 (2004). As this, Court explained, casting away well-intentioned sentencing regimes was necessary because the *Apprendi* rule[5] "reflects not just respect for longstanding precedent, but the need to give *intelligible content to the right of jury trial*. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, *jury trial is meant to ensure their control in the judiciary*." *Blakely*, 542 U.S. at 306 (emphasis added). Steadfast adherence to the unanimity rule – and rigorous skepticism of any action that might undermine it – is no less fundamental in giving "intelligible content" to the right to trial by jury.

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[5] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

II. This Court Should Grant *Certiorari* Because Permitting An *Allen* Charge Where The Lone Holdout Juror's Identity Has Been Divulged And Later Removing That Juror Would Strip Unanimous Verdicts Of Their Legitimacy And Exacerbate The Suppression Of Minority Viewpoints In Jury Deliberations

A. A Unanimous Verdict Decided By A Jury That Is Representative Of The Community Promotes Social Cohesion And Confidence In The Legal System

"It is [] the established tradition in the use of juries as instruments of public justice that the jury be a body *truly representative* of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940) (emphasis added). Its "purpose . . . is to impress upon the [criminal] defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers v. Ohio*, 499 U.S. 400, 413 (1991). Indeed, the "unmistakable import of this Court's opinions . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

Of course, for the community to accept any given jury's verdict as "fair," it must not only be confident that every (eligible) member of the community has an equal opportunity to be selected as a juror, but that those selected have the opportunity to participate in the jury's deliberative process free from coercion or other unwarranted intrusion. Otherwise, the community (or at the least those segments that might

view the jury process with suspicion – primarily, those with minority perspectives) is bound to lose confidence in the criminal justice system. *See, e.g.*, *id.* at 530 ("Community participation in the administration of the criminal law moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.").

That would be an unwelcome development not only from a constitutional perspective but from a political one as well. Nancy S. Marder, *Juries, Justice and Multiculturalism* ("*Juries, Justice*"), 75 S. CAL. L. REV. 659, 661 (2002) (observing that juries play "a key role . . . in constituting the judiciary . . . [and] [a]s an institution consisting of ordinary citizens temporarily called to serve a governmental function, the jury is able to dispel popular distrust of the judiciary and secure community acceptance for verdicts"). Indeed, the more closely a jury's composition reflects that of its members' community, the greater the perceived legitimacy and acceptance of its verdict. *See, e.g.*, Marder, *Juries, Justice*, *supra*, at 662 ("If there is to be broad community acceptance of a jury's verdict, then the jury must be seen as drawing its members from the entire community."). This is so for the same reason the Constitution's unanimity requirement bolsters a verdict's legitimacy: it provides the community with confidence that the verdict accurately reflects the *entire* community's values and social norms. *See, e.g.*, Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 67, 81 (2008) (noting that "[a] jury's racial composition . . . has the potential to impact the way its verdict is perceived by the

surrounding community," and that "homogenous juries can appear to be less than impartial, inspire concerns that the jury will have undue affinity toward other members of the majority group, and elicit the fear that minority litigants will have little 'voice' in the legal process"); Joshua Wilkenfeld, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 COLUM. L. REV. 2291, 2314 (2004) ("Communities view demographically balanced juries as more legitimate than those that are unreflective.").[6]

In addition to promoting social acceptance and cohesion, the empirical research on jury decision-making has shown that both unanimity and diversity actually produce more careful and thorough jury deliberations and more accurate verdicts. *See, e.g.*, REID HASTIE, ET AL., INSIDE THE JURY 108 (1983) (finding that mock juries that were required to reach a unanimous verdict deliberated more thoroughly and spent more time discussing the evidence); Shari Diamond, et al., *Revisiting the Unanimity*

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[6] Not surprisingly, where non-diverse juries convict defendants whose racial group is not represented among their members, societal acceptance of the verdicts is low and under-represented groups demonstrate dissatisfaction with the community. *See, e.g.*, Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L. J. 704, 707 (1995) (noting that the acquittal of the four white police officers in the Rodney King case by a jury containing no African-Americans "triggered the worst race riot in American history"); Leslie Ellis & Shari Seidman Diamond, *Race, Diversity and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.–KENT L. REV. 1033, 1038 (2003) ("racial composition of the jury" in the Rodney King and O.J. Simpson cases "negatively affected both the juries' decision-making processes and the legitimacy of the verdicts").

Requirement: The Behavior of the Non-Unanimous Civil Jury, 100 NW. U. L. REV. 201, 212-17 (2006) (documenting that real juries were less concerned about deliberations and refused to consider the merits of the minority view when told that unanimity was unnecessary); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1263-64 (2000) ("[R]esearch conducted in the past two decades reveals that eliminating the obligation to secure each person's agreement on the verdict can result in truncating or even eliminating jury deliberations. By discouraging meaningful examination of opposing viewpoints, majority rule [on juries] impoverishes deliberations.") (citations omitted).

No two jurors will interpret the evidence in exactly the same way. Their differing experiences shape how they "organize[] the information . . . receive[d] about a case into what for [them] is the most plausible account of what happened and then pick[] the verdict that fits that story best." Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 78 (1993) ("Jurors may interpret the same evidence differently depending on which stories they choose.") (citation omitted); *see also* James A. Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 LAW & HUM. BEHAV. 83, 84-85 (1985).

For instance, when presented with the same evidence of mitigating factors in death penalty cases, what white jurors often viewed as "incorrigibility, a lack of emotion, and deceptive behavior," black jurors took as "a disadvantaged upbringing, remorse, and sincerity." William Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of*

Juror's Race and Jury Racial Composition, 3 U. PA. J. CONST. L. 171, 248 (2001); *see also* King, *supra*, at 81 ("Because racial background may influence a juror's judgment of whether any given story is a reasonable explanation of events, black and white jurors may reach different conclusions after evaluating the same evidence.").

Studies also suggest that the deliberative process itself significantly *benefits* from the presence of multiple viewpoints. A jury composed of individuals with diverse experiences can positively influence the quality of deliberations by making it more likely that jurors will be able to "bridge cultural [and socioeconomic] gaps" between each other and the defendant. *See, e.g.*, Taylor-Thompson, *supra*, at 1285. That in turn can lead to an even wider range of deliberations. *See, e.g.*, Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations* ("*Jury Deliberations*"), 90 J. PERSONALITY & SOC. PSYCHOL. 597, 599 (2006) ("Diverse juries enjoy wider ranging discussions because White and Black jurors bring different experiences and perspectives to the jury room."); Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 76 YALE L.J. 593, 604 (1987) ("The use of juries is predicated on the assumption that different people see things differently, and one function of the jury is to bring people's different perceptions to the trial process.").

In a recent study of mock juries, for example, racially "heterogeneous groups deliberated longer and considered a wider range of information than . . . homogenous groups." Sommers, *Jury Deliberations*,

supra, at 598. They also demonstrated superior problem solving skills, "group creativity, information sharing, flexibility, and thoughtfulness." *Id.*; *accord* John Gastil, et al., *Do Juries Deliberate? A Study of Deliberation, Individual Difference, and Group Member Satisfaction at a Municipal Courthouse*, 38 SMALL GROUP RES. 337, 354 (2007) (ideological diversity on juries "likely prompt[s] jurors to consider different interpretations of the law," and "stimulates discussion"); Wilkenfeld, *supra*, at 2307-08 (stating that "[l]egal theory supports the proposition that juries perform better the more they maintain the community's diversity," and noting that "diversity may increase the *capacity* of a jury to engage in factfinding by enhancing the jury's ability to interpret the significance of facts and law" and that "diverse juries are, in the aggregate, better able to remember and understand a greater amount of material discussed at trial than homogenous juries") (emphasis in original).

Without the benefit of diverse perspectives, jurors may, for example, be prone to favor members of their own group. *See, e.g.*, Sommers, *Jury Deliberations*, *supra*, at 598; Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1626-29 (1985) (citing studies demonstrating that white subjects "were more likely to find a minority-race defendant guilty than they were to find an identically situated white defendant guilty," but that after deliberation between juror members of different ethnic groups, "the jurors' ethnicity no longer exerted a significant influence on their verdicts") (citing Jack Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAV. SCI. 275, 282 (1983)). The effect of a jury's racial composition is perhaps most evident in death penalty cases, where empirical

studies report that black defendants are less likely to receive death sentences when black citizens are represented on the jury. *See, e.g.*, Bowers, *supra,* at 192 & Tbl. 1, 259 (finding that life sentence was two times more likely when jury contained at least one black male, while death penalty was three times more likely when jury contained five or more white male jurors); David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview*, 83 CORNELL L. REV. 1638, 1721 n.159 (1998) ("Preliminary findings from our analysis of jury racial composition . . . suggest that black defendants are treated less punitively vis-à-vis non-black defendants as the proportion of blacks on the juries increases.").

In short, these studies confirm what this Court has long recognized: that juries benefit when they are drawn from a cross-section of the community. Accordingly, the Court has repeatedly struck down practices that have the "effect . . . to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff*, 407 U.S. 493, 503, 510 (1972); *Glasser v. United States*, 315 U.S. 60, 85-86 (1942) (the jury should "be a body truly representative of the community . . . and not the organ of any special group or class").[7]

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[7] *See also Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("[S]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of system of justice."); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994).

The benefits of a unanimous verdict delivered by a representational jury are lost, however, if the trial judge short-circuits the deliberative process – as may have occurred here – by not only giving an *Allen* charge where the lone holdout's identity was known but then removing that holdout where the context suggests that her removal was based, at least in part, on her position during deliberations.[8] Although the verdict here was unanimous, it was only nominally so, because it did not reflect the honestly held views of the holdout.

B. Permitting Judges To Issue An *Allen* Charge Where The Lone Holdout Juror's Identity Is Known Magnifies The Already Significant Psychological Pressure That Lone Holdouts Face To Accede To The Majority Viewpoint

Not surprisingly, those in the minority already feel significant pressure to conform to the majority's position. It is well understood that maintaining a minority viewpoint is extraordinarily difficult, even in low-pressure, consequence-free situations – and even where the majority's position is *clearly wrong*. *See, e.g.*, Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40

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[8] To be clear, *amicus curiae* is not suggesting that the removal of a lone holdout is a *per se* constitutional violation. There certainly are circumstances where removal of a juror (holdout or otherwise) is required to preserve the parties' rights to an impartial jury. *See, e.g.*, *United States v. Thomas*, 116 F.3d 606, 613 (2d Cir. 1997) (juror "dismissals have been upheld repeatedly in cases where the trial court found the juror was no longer capable of rendering an impartial verdict").

U. MICH. J.L. REFORM 569, 607-10 (2007) (discussing Professor Asch's ground-breaking study in which a solid majority intentionally misstated their view as to the length of a line, and despite not voicing any express disapproval of holdouts, holdouts nonetheless felt "an oppressive sense of loneliness which increased in prominence as [they] contrasted their situation with the apparent assurance and solidity of the majority") (quoting Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS 1, 27-32 (1956)); *see also* Note, *On Instructing Deadlocked Juries*, 78 YALE L. J. 100, 110 (1968) ("Participants in a discussion are often influenced to change their opinion simply by the knowledge that an overwhelming majority disagrees with them. Consistent disapproval by the majority can shake a small minority's faith even in judgments it believes to be right.").

The fewer in the minority, the more intense the pressure they face to conform. *See, e.g.*, Bibb Latané & Sharon Wolf, *The Social Impact of Majorities and Minorities*, 88 PSYCHOL. REV. 438, 439, 441 (1981) ("[T]he greater the number of people advocating a position, the greater are their resources for rewarding those who conform to that position and punishing those who deviate . . . . When influence pressure is generated by a unanimous majority, all of the social forces acting on an individual target will pull him in the same direction."). In the case of the lone holdout – a minority of one – that pressure to conform is at its zenith. *See generally* Reichelt, *supra*, at 610.

Lone holdouts on juries present a special case. In this setting, the holdout juror faces more than "silent

pressure," but the pressure to accede to the view of "a unanimous majority of jurors who have been ordered to stay in a room until they reach a unanimous verdict through deliberation." *Id.*; Sommers, *Jury Deliberations*, *supra*, at 600 (noting that a lone holdout "who perceives a lack of social support or potential allies may be particularly likely to remain quiet and succumb to group pressure") (citation omitted). Accordingly, lone holdouts, who – as was the case here – may often represent minority backgrounds, can experience significant discomfort and stress, and often face implied coercion at the hands of the majority. *See, e.g.*, *United States v. Symington*, 195 F.3d 1080, 1084 (9th Cir. 1999) (describing holdout juror's complaint that she was pressured by the other jurors); *Love v. Yates*, 586 F. Supp. 2d 1155, 1187 (N.D. Cal. 2008) (same); *Robinson v. Gibson*, 35 F. App'x 715, 719 (10th Cir. 2002) (discussing African-American female juror's claim that she was intimidated into voting for the death penalty by her fellow jurors).

Lone holdouts face not only pressure from fellow jurors, but institutional pressure from the trial judge. Because the judge "holds a powerful, respected position in the jurors' eyes," she is well-positioned to significantly influence jury decision-making (and frequently does so). Note, *Deadlocked Juries and the* Allen *Charge*, 37 ME. L. REV. 167, 173 (1985) (citing *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971)). "Courts have [therefore] long recognized both the influence a trial judge may have on jurors and the subtle ways in which that influence can become unduly coercive." Danielle Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 224 (2005).

For example, in *Quercia v. United States*, 289 U.S. 466, 470 (1933), this Court observed that a trial judge's decision to comment on evidence even before the jury had retired for deliberations, while not wholly inappropriate, must be done with care because "[t]he influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'" Where deliberations have been ongoing, and there is an impasse – as in the case of a lone holdout – "a[n] [even] heightened potential for coercion exists when a judge communicates with a jury." Courselle, *supra*, at 225; *accord* Reichelt, *supra*, at 613. Studies in fact confirm that after receiving an *Allen* charge, "jurors in the minority feel coerced [into] chang[ing] their votes, while leading those in the majority to exert increasing amounts of social pressure." Vicki L. Smith & Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 LAW & HUM. BEHAV. 627, 640-41 (1993) (reviewing two studies discussing the effect *Allen* charges have on hung juries).

This case appears to be a paradigmatic example of those exact pressures at play: Juror No. 10 was a woman of South American descent who, for various reasons, appears to have had difficulty in articulating her viewpoint to the majority. That difficulty, in turn, gave rise to symptoms of emotional "distress" and "strain" that could have been mistaken as a lack of willingness to deliberate for "health" reasons, *see* Pet'r's App. at 17a-20a, which ultimately led to her dismissal. These circumstances thus demonstrate why there needs to be a higher degree of scrutiny applied to the removal of holdout jurors, since there will often be plausible and facially neutral reasons for removal –

and yet, those reasons may in fact merely be derivative of the inherent pressures resulting from a holdout's genuinely held assessment of the evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

BRADLEY J. STINN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NORTHERN CALIFORNIA INNOCENCE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Issues Implicated By Petitioner's Claims With Respect To The Use Of The "Dynamite" Charge Are Ripe For Examination. 3

A. There Is A Dearth Of Precedent From The Court With Respect To The Coercive Effect Of "Dynamite" Instructions. 3

B. Research After *Lowenfield* Demonstrates An Additional Need For Action By This Court To Safeguard The Rights Of Criminal Defendants. 6

II. The Court Should Use This Opportunity To Provide Guidance With Respect To The Circumstances Under Which Removal Of A Holdout Juror Is Appropriate And The Appropriate Standard Of Review On Appeal..... 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Allen v. United States,
164 U.S. 492 (1896) 2, 3, 4

Arizona v. Washington,
434 U.S. 497 (1978) 9

Jenkins v. United States,
380 U.S. 445 (1965) 4

Lowenfield v. Phelps,
484 U.S. 231 (1988) 4

Perez v. Marshall,
119 F.3d 1422 (9th Cir. 1997) 13

Quercia v. United States,
289 U.S. 466 (1933) 9

Starr v. United States,
153 U.S. 614 (1894) 9

Tucker v. Catoe,
221 F.3d 600 (4th Cir. 2000) 5

Rules

Fed. R. Crim. P. 23(b)(3) 12

Fed. R. Crim. P. 24(c)(3) 12

Supreme Court Rule 37.2 1

Supreme Court Rule 37.6 1

Other Authorities

Diane E. Coursell, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. Rev. 203 13

George C. Thomas III and Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 Wm. & Mary Bill Rts. J. 893 (2007) 5

Kate Marquess, *Juries Hang Up on Close Calls, Study Says: Data Shows That Evidence, not Diversity, Is the Main Factor*, A.B.A. J. E-Report, Oct. 18, 2002, *available at* WL 1 No. 40 ABAJREP 3 10

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Monica K. Miller and Brian H. Bornstein, *Do Juror Pressures Lead to Unfair Verdicts?* Monitor on Psychol., Mar. 2008, at 18, *available at* http://www.apa.org/monitor/2008/03/jn.aspx..... 8

Paula L. Hannaford-Agor, et al., *Are Hung Juries A Problem?* Nat'l Ctr. for St. Cts. 76 (Sept. 22, 2002), *available at* http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf..... 10

Saul M. Kassin, et al., *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 Law & Hum. Behav. 537 (1990) 6, 7

Shari Seidman, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201 (2006) 10, 11

Vicki L. Smith and Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 Law & Hum. Behav. 625 (1993) 7, 8

BRIEF OF THE NORTHERN CALIFORNIA INNOCENCE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Northern California Innocence Project (NCIP) is a nonprofit legal clinic and criminal justice resource center affiliated with the law school at Santa Clara University. As a member of the Innocence Network, it works to exonerate innocent prisoners and pursue legal reforms that address the causes and consequences of wrongful convictions. Recent research validates the NCIP's experience in post-conviction DNA exonerations that judicial measures that intentionally or unintentionally target holdout jurors to arrive at a verdict can and often do generate wrongful convictions. The NCIP respectfully submits that the Court should grant certiorari to review the propriety of "dynamite" instructions and the other potentially coercive judicial conduct at issue here and to ensure that the Fifth and Sixth Amendment rights of criminal defendants are fully protected in future proceedings.

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[1] In accordance with Supreme Court Rules 37.2 and 37.6, counsel for the *amicus* represent as follows: None of the parties or their counsel, nor any other person or entity other than the *amicus*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. This brief was authored in its entirety by counsel for the *amicus*. The parties received timely notice of the *amicus*'s intent to file this brief and gave their consent. Letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

It has been more than two decades since this Court last addressed the propriety of jury instructions modeled on the charge it first approved in *Allen v. United States*, 164 U.S. 492 (1896). Reexamination of those so-called "dynamite" instructions is necessary for at least two reasons. First, recent research demonstrates that such instructions imperil a criminal defendant's constitutional rights because they tend to exert strong pressure on holdout jurors to abandon their beliefs and side with the majority. Second, recent research shows that when jurors do hold out against the majority, it is typically not out of pique or obduracy, but due to an honest and reasonable disagreement with their fellow jurors as to the probative value of the evidence. Those new developments, along with the sheer number of federal-court appeals engendered by the lack of clear rules in this area, make clear that the time has come for the Court to evaluate when, if ever, an *Allen* instruction is appropriate.

Although this Court has not addressed the coercive effect of the *Allen* charge in more than twenty years, it never has addressed the circumstances under which a trial court may remove a deliberating juror without the consent of the parties or the standard under which such a decision is reviewed by an appellate court. Those issues are similarly fraught with serious implications for the constitutional rights of criminal defendants and therefore are ripe for review by the Court.

ARGUMENT

This case presents two critical questions: First, when a juror is the lone holdout in favor of acquittal and has stated as much in open court, can the trial judge issue a "dynamite" instruction urging the jury to continue deliberating and return a verdict? Second, what degree of scrutiny is warranted when a trial judge removes that lone holdout from the jury? The petitioner has set forth in detail the clear circuit splits on both issues. *See* Pet. 16-24; 26-29. Those splits provide a sufficient ground for the grant of certiorari in this case and will not be revisited here. Instead, this brief highlights the broader implications that these issues have for innocent criminal defendants and demonstrates why those implications warrant a grant of certiorari.

I. The Issues Implicated By Petitioner's Claims With Respect To The Use Of The "Dynamite" Charge Are Ripe For Examination.

A. There Is A Dearth Of Precedent From The Court With Respect To The Coercive Effect Of "Dynamite" Instructions.

More than a century ago, in *Allen v. United States*, 164 U.S. 492 (1896), the Court declined to reverse a defendant's conviction based on the delivery of a jury instruction encouraging the jury to reach a verdict. The instruction at issue, which was read to the jury after it had begun deliberating and then requested further direction from the court, stated, among other things, that it was the jurors' "duty to decide the case if they could conscientiously do so."

Id. at 501. The instruction also addressed the jurors in the minority, advising "if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression on the minds of so many men, equally honest, equally intelligent with himself." *Id.* In approving the instruction, the Court noted that "[i]t certainly cannot be the law that each juror should not listen with deference to the arguments, and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself." *Id.*

Subsequent decisions have grappled with the inherent potential such instructions possess to coerce a jury's verdict. In *Jenkins v. United States*, 380 U.S. 445, 446 (1965), this Court held that a trial judge's instruction to the jury that "'[y]ou have got to reach a decision in this case,'" was impermissibly coercive, reversed the defendant's conviction, and remanded for a new trial. Following *Jenkins*, this Court did not revisit the propriety of *Allen*-type instructions until *Lowenfield v. Phelps*, 484 U.S. 231 (1988). There, the Court concluded that a jury instruction that directed jurors to "'not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong,'" was permissible. *Id.* at 235, 241. Notably, however, the instruction in *Lowenfield* did not invite the minority to reevaluate its position and it further directed the jurors to "'not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.'" *Id.* at 235.

In the more than twenty years that have passed since *Lowenfield*, the Court has not taken up the question of the coercive effect of *Allen*-type jury instructions. However, the fact that the Court has not addressed the issue in recent times does not mean that the law is now well settled. Different circuits apply different rules of law in this area, as demonstrated most prominently by the circuit split identified by the petitioner. *See* Pet. 16-24. *See also* George C. Thomas III and Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 Wm. & Mary Bill Rts. J. 893, 913 (2007) ("The wildly varying approaches of the federal courts of appeal suggest that there is simply no federal law about how to charge deadlocked juries."). Moreover, the law when applied has confusing and unpredictable results. The Fourth Circuit considers no fewer than nine separate factors in connection with determining whether a "dynamite" instruction has an impermissibly coercive effect on the jury. *See Tucker v. Catoe*, 221 F.3d 600, 611 (4th Cir. 2000) (identifying as "some of the relevant considerations in reviewing an *Allen* charge for coerciveness" the following: "the charge in its entirety and in context; suggestions or threats that the jury would be kept until unanimity is reached; suggestions or commands that the jury must agree; indications that the trial court knew the numerical division of the jury; indications that the charge was directed at the minority; the length of deliberations following the charge; the total length of deliberations; whether the jury requested additional instruction; and other indications of coercion"). The Court should grant certiorari to supply some necessary clarity to this area of the law.

B. Research After *Lowenfield* Demonstrates An Additional Need For Action By This Court To Safeguard The Rights Of Criminal Defendants.

The time is ripe to clarify the law on the issue of "dynamite" instructions for another reason – because we now know much more about the *Allen* charge than we did in 1988. Since *Lowenfield*, three relevant lines of empirical research have emerged, demonstrating: (1) the powerful coercive effects that "dynamite" instructions have on holdout jurors; (2) the dubious nature of the benefits purportedly gained by the use of such instructions; and (3) the proliferation of appeals that undermines any argument from efficiency in favor of *Allen* charges. These concerns, taken together, have prompted a growing chorus of voices to underscore the need for the Court to reconsider the propriety of the *Allen* charge.

1. Recent research has demonstrated that delivery of an *Allen* charge can have a severe coercive effect that subverts the willingness of a holdout juror to stand firm against a majority of his or her colleagues. One study, published in 1990, reported the results of an experiment in which participants, led to believe that they were a part of a mock jury, passed and received notes with individuals they believed to be their fellow jurors with the goal of arriving at a verdict. *See* Saul M. Kassin, et al., *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 Law & Hum. Behav. 537 (1990). At the outset of the experiment, each participant read a four-page summary of a criminal case and recorded his or her preliminary views with re-

spect to the guilt or innocence of the hypothetical defendant. *Id.* at 540. The participants were then randomly classified as "majority" or "minority" jurors. *Id.* at 539-40. Jurors assigned to the "majority" received two notes in the early phase of deliberations that agreed with their position and one that did not. *Id.* at 540. Jurors assigned to the "minority" received three notes disagreeing with their position. *Id.* After a set number of notes had been passed, some jurors were read the *Allen* instruction and a control group was not. *Id.* at 541. The jurors were then evaluated on the basis of whether they changed their votes and surveyed as to their perceptions of the process. *Id.* at 541-42. The jurors' explanations for their ultimate votes were also analyzed. *Id.* at 542. The study found that "[a]mong subjects who were subjected to the dynamite charge, . . . those in the minority were more likely to capitulate than those in the majority." *Id.* at 543. Ultimately, the study concluded that "the dynamite charge causes jurors in the minority to feel pressured and change their votes and that it encourages those in the majority to exert increasing amounts of normative influence." *Id.* at 547.

A follow-up study in 1993 reached similar conclusions. *See* Vicki L. Smith and Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 Law & Hum. Behav. 625 (1993). There, six- to twelve-person mock juries were asked to deliberate with respect to a hypothetical criminal law fact pattern. *Id.* at 629. Again, the participants' preliminary views as to guilt or innocence were solicited and the mock juries were structured based on those initial responses such that each mock jury was "stacked 4-to-2 in favor of conviction or ac-

quittal." *Id.* As with the note-passing experiment, certain groups of participants were read the *Allen* charge after deliberating for some time, while certain control groups received no such instruction. *Id.* Deliberations then continued until a unanimous verdict was reached or until 50 minutes had elapsed. *Id.* at 630. Video of the deliberation sessions and questionnaires filled out by the participants were then analyzed by the researchers. *Id.* Observing that "[t]here was a sharp increase in vote changes among minority jurors who received the dynamite charge, but not among those in the majority," the researchers concluded that "the dynamite charge moved deadlocked juries toward unanimity, selectively causing minority jurors to change their votes." *Id.* at 640. The researchers also found some suggestion that a dynamite charge "may hasten the deliberation process in juries favoring conviction, but not in those favoring acquittal." *Id.* at 634.

Others have weighed in with similar observations. *See, e.g.*, Monica K. Miller and Brian H. Bornstein, *Do Juror Pressures Lead to Unfair Verdicts?* Monitor on Psychol., Mar. 2008, at 18, *available at* http://www.apa.org/monitor/2008/03/jn.aspx (noting that "[a] judge's dynamite charge could make jurors feel coerced into changing their votes" and "also leads those in the majority to exert more pressure on jurors in the minority"). Importantly, "this research suggests that minority jurors are not conforming based on *informational influence* (i.e., because they are actually persuaded), but because of *normative influence* (i.e., because of social pressure)." *Id.* Indeed, the Court itself has recognized that "if [the trial judge] fails to discharge a jury which is unable

to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Arizona v. Washington*, 434 U.S. 497, 509 (1978)).

The results of this research underscore the serious constitutional questions implicating a criminal defendant's Fifth and Sixth Amendment rights raised by the Petitioner. *See* Pet. 10-15. As the Court has recognized, "[t]he influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'" *Quercia v. United States*, 289 U.S. 466, 470 (1933) (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894)). Viewed through this prism, several portions of the jury instructions given in this case raise serious constitutional concerns, most notably the trial judge's observations that "it is not uncommon how much strain it is on each person to be here for a long period of time," that "it is s [sic] desirable that a verdict be reached," and that it is jurors' "sworn duty to consult with one another and to consider each other's views." Pet. App. 48a. As the research demonstrates, those instructions likely would have a powerful coercive impact on any lone juror holding out for acquittal.

2. A separate line of research calls *Allen*'s social utility into question. According to this research, holdout jurors generally adhere to their positions not because they misunderstand the facts or the law or are simply being obstinate, but because they have

good-faith disagreements with their fellow jurors about the evidence. In many cases, then, *Allen* charges presumably cause holdout jurors to abandon good-faith, well-reasoned and well-supported positions that favor the acquittal of criminal defendants. In an article reporting on a recent comprehensive study of hung juries by the National Center for State Courts, a reporter noted that "the biggest surprise to researchers was that juries deadlock when they ought to deadlock – when the evidence is evenly split between both sides." Kate Marquess, *Juries Hang Up on Close Calls, Study Says: Data Shows That Evidence, not Diversity, Is the Main Factor*, A.B.A. J. E-Report, Oct. 18, 2002, *available at* WL 1 No. 40 ABAJREP 3. As the study itself, a four-year effort funded by the National Institute of Justice, observed: "By far, the most frequent primary cause of hung juries was weak evidence." Paula L. Hannaford-Agor, et al., *Are Hung Juries A Problem?* Nat'l Ctr. for St. Cts. 76 (Sept. 22, 2002), *available at* http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf.

A recent study of jury deliberations in Arizona state court corroborates those conclusions. *See* Shari Seidman, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201 (2006). The Arizona Supreme Court permitted the researchers to videotape fifty civil trials and jury deliberations between 1998 and 2001. *Id.* at 204. Of the fifty cases, sixteen ended deliberations with at least one holdout on at least one claim. *Id.* at 212. Upon reviewing the sixteen holdout cases, the researchers "found no evidence that the jurors who were outvoted by the ma-

jority were advocating indefensible positions." *Id.* at 220. Instead, "[i]n each case, the holdout jurors articulated reasons for their positions based on judgments about appropriate behavior, the credibility of the witnesses, the nature of appropriate compensation, or some combination of these three factors." *Id.* One final noteworthy aspect of the study was its survey of the trial judges for their opinions on the merits of their respective cases. Remarkably, the researchers found that for six of 16 holdout cases, the trial judge "would have sided with the holdouts." *Id.* at 221-22. These findings are consistent with the experiences of the NCIP and other Innocence Network member organizations in post-conviction DNA analysis exonerations and counsel a reevaluation by the Court as to whether "dynamite" instructions achieve any worthwhile purpose, or whether they instead simply tend to generate convictions where at least one juror may have a genuine and reasonable doubt as to guilt.

3. Recent research also has illuminated a third consideration that supports certiorari – uncertainty with respect to the law of *Allen* charges is clogging the lower courts' dockets and offsetting any perceived gain in efficiency that accompanies the use of the charge. *See* Mark M. Lanier and Cloud Miller III, *The* Allen *Charge: Expedient Justice or Coercion?* 25 Am. J. Crim. Just. 31, 36 (2000) (identifying 566 cases from January 1964 through March 1999, "in which a judge actually issued the *Allen* Charge, a guilty verdict was rendered, and a Federal Circuit Court reviewed the case on appeal"). Counsel for *amicus* found 165 decisions by the federal circuit courts of appeal from January 2000 to present that

cite to the Court's decision in *Allen*. So, *Allen* instructions erode a criminal defendant's constitutional rights to a fair trial and unanimous verdict without producing any real offsetting gain in the efficiency of the justice system. As the commentators who conducted the study referenced above observed, "[w]hile the lower courts may view the *Allen* Charge as an expedient practice, it ultimately delays and increases the psychological, physical, and monetary burdens associated with the legal process." *Id.* at 39. Certiorari is warranted for that reason as well.

II. The Court Should Use This Opportunity To Provide Guidance With Respect To The Circumstances Under Which Removal Of A Holdout Juror Is Appropriate And The Appropriate Standard Of Review On Appeal.

Two provisions of the Federal Rules of Criminal Procedure confer on the trial court the authority to remove a juror following the commencement of deliberations without the consent of the parties. The first is Rule 23, which was amended in 1983 to provide in part: "After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror." Fed. R. Crim. P. 23(b)(3). The other provision is Rule 24, which was amended in 1999 to provide in part: "The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after delibe-

rations have begun, the court must instruct the jury to begin its deliberations anew." Fed. R. Crim. P. 24(c)(3). The Court never has addressed the standard to be applied by the trial court when it elects to remove a deliberating juror pursuant to either of those provisions. Nor has it considered the appropriate standard to be used on appeal when evaluating such a decision by the trial court – the same issue that is the subject of the second circuit split identified by petitioner. *See* Pet. 26-29.

As petitioner's brief makes clear, these issues raise serious constitutional concerns, particularly in the context of the removal of a known holdout juror. As one commentator has noted, "dismissing a juror when the judge knows the juror is the lone holdout for acquittal – and the remaining jurors are aware that the judge acted with this knowledge – may send a message to the remaining jurors that the judge endorses their position." Diane E. Coursell, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. Rev. 203, 241 (citing *Perez v. Marshall*, 119 F.3d 1422, 1429 (9th Cir. 1997) (Nelson, J., dissenting)). Moreover, the substitution of an alternate under Rule 24(c) does not correct the problem. *See id.* at 253 ("The judge's decision to discharge a dissenting juror and replace her with an alternate, however, may steel the remaining jurors as to the correctness of their opinions. This judicial reinforcement can make it particularly hard for the newly substituted alternate to disagree.") Because these issues never have been addressed by the Court and because they raise significant concerns over the conviction of innocent defendants, the Court should grant certiorari to address them as well.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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